Supreme Court, U. S.
FILED
JUL 23 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1187

JOSEPH BAXTER, et al.,
Petitioners,

v.

NICHOLAS A. PALMIGIANO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED 3/19/75
CERTIORARI GRANTED 6/9/75

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. #5053

NICHOLAS A. PALMIGIANO,
PLAINTIFF,
v.

JOSEPH BAXTER,
Captain, Adult Correctional Institutions,
State of Rhode Island;
NORMAN CARNEY,
Officer, Adult Correctional Institutions;
MITCHELL SINER,
Officer, Adult Correctional Institutions;
FRANCIS HOWARD,
Warden, Adult Correctional Institutions;
ROLAND P. REMILLARD,
Deputy Warden, Adult Correctional Institutions.

DOCKET ENTRIES

1972		
Nov.	15	Complaint filed together with Appearance of Stephen J. Fortunato, Jr., Esq. for Pltff.
		Summons issued returnable within 20 days after service.
		Pltff's Motion for Temporary Restraining Order filed.
	16	Order to Show Cause re granting of Preliminary Injunction entered and Hearing Nov. 21, 1972
		Petition for Writ of Habeas Corpus ad Test. filed.
		Order re Writ of Habeas Corpus ad Test re Nicholas Palmigiano entered and Writ issued.
	17	Summons returned duly served and filed.
		Writ returned duly served and filed.
	21	Deft's Answer filed with appearance of W. Slater Allen Jr.

1972

Appearance of Ellen Katz, Esq. for Pltff filed.
Appearance of Edward F. Burke, Esq. for Defts. filed.
Case proceeds to hearing.
Stephen J. Fortunato, Jr., Esq. and Ellen Katz, Esq. for Pltff.
W. Slater Allen, Asst. Atty. Gen'l and Edward F. Burke, Esq. for Defts.
2 Pltff's Witnesses sworn. 1 Pltff's Exhibit introduced.
2 Defts' Exhibits introduced.

22 Hearing continues. 3 Pltff's Witnesses sworn.
Mr. Allen plays tape on the recording machine to Court — Ex. B.
Pltff. Rests. Mr. Fortunato requests permission to amend pleadings, etc. Motion granted.
Mr. Burke makes statement re "Morriss Rules".
Defts' Rest.
Mr. Allen argues to Court. Mr. Fortunato argues to Court.
Memos to be filed by November 27, 1972.
Court reserves decision.

27 3 Pltff witness subpoenas and 1 Pltff document subpoena returned duly served and filed.
Pltff's Amended Complaint filed.
Affidavit of Nicholas Palmigiano filed.

Dec. 15 Opinion filed.

1973

Jan. 4 Pltff's Motion for Reconsideration filed.

5 Withdrawal of Cary Coen, Esq. as Atty. for Pltff. approved and filed.

15 Appearance of E. W. Katz, Esq. for Pltff. filed.
Case called for hearing. E. W. Katz, Esq., for Pltff. argues Motion for Reconsideration. W. S. Allen, Esq. for Deft. argues in reply. Mrs. Katz —in reply. Court reserves decision.

1973

19 Opinion filed re motion for re-consideration.

26 Opinion filed re Motion for Reconsideration entered and filed.

Feb. 16 Pltff's Motion for Leave to appeal in forma pauperis and Order granting said Motion entered and filed.
Pltff's Notice of Appeal filed (copy to W. Slater Allen Esq., Counsel for Defts.)

21 Authorization for transcript in forma pauperis approved and filed.

Mar. 16 Reporter's Transcript re: Hearing re Pltff's Motion for Temporary Restraining Order filed.

19 Voucher for transcript approved and filed (copy to Admin. Office).

20 Record on Appeal together with certified copy of docket entries mailed to Clerk, Court of Appeals, Boston, Mass.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 73-1088

GENERAL DOCKET

1973

Mar. 21 Record on appeal in two volumes filed and case docketed.

23 Appearance of W. Slater Allen, Jr. for appellees filed.

Apr. 2 Appearances of Ellen Wilbur Katz and Stephen J. Fortunato, Jr., for the appellant filed.

4 Appellant's Designation and Statement of Issues filed.

1973

20 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellant to May 25, 1973. Notices mailed.

May 25 Appendix to briefs and brief for appellant filed.

June 18 Motion filed. Order (McEntee, J.) enlarging time for filing brief for appellees to June 29, 1973. Notices mailed.

July 9 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing brief for appellees to July 20, 1973. Notices mailed.

July 20 Brief for appellee filed.

26 Motion filed. Order (Coffin, Ch.J.) granting leave to amicus curiae to file 4 copies of brief etc. Notices mailed.

Aug. 7 Stipulation *re* amicus brief filed. Brief amicus curiae for Robert Flint and Michael Roberts filed.

29 Assigned for hearing at the September, 1973, session.

Sept. 5 Heard before Coffin, McEntee and Kilkenny.

Nov. 16 Judgment: The judgment of the District Court is vacated and the cause is remanded to that Court for further proceedings consistent with the opinion of the Court filed this day. Appellant to recover 3/4 of his costs; no other costs. Opinion of the Court by Coffin, Chief Judge. Dissenting opinion by Kilkenny, J. Notice mailed.

Dec. 3 Motion filed. Order (Coffin, Ch.J.) enlarging time for filing itemized and verified bill of costs to December 4, 1973. Notices mailed.

10 Mandate issued; copy filed. Taxation of costs filed.

26 Notice of appeal filed.

1974

Jan. 4 "Motion for Stay" and memorandum in support thereof filed.

15 Motion filed. Order (Coffin, Ch.J.) granting leave to appelalnt to file response and opposition to motion for stay today. Notices mailed. Appellant's response and objection to motion for stay filed.

16 Order (Coffin, Ch.J.) denying motion for stay. Notices mailed.

Aug. 9 Certified copy of Supreme Court granting certiorari (7/8/74) [No. 73-1247] filed. Certified copy of order of Supreme Court vacating judgment of this court and remanding for further proceedings (7/8/74) filed. [No. 73-1247]. Order (Campbell, J.) directing counsel to file memoranda on or before Sept. 6, 1974. Notices mailed.

Sept. 6 Memorandum of Law of Nicholas A. Palmigiano filed.

11 Motion filed. Stipulation filed. Order (Coffin, Ch.J.) granting leave to Michael Roberts et al. to file a memorandum amici curiae. Notices to counsel. Memorandum of amici filed.

20 Memorandum on remand filed by appellees.

30 Submitted to Coffin, Ch.J., McEntee and Campbell, JJ.

Dec. 20 Judgment: The judgment of the District Court is affirmed in part and reversed in part, and the cause is remanded to the District Court for further proceedings consistent with the opinion of this Court of November 16, 1973, as amended by the opinion of the Court filed this day. Appellant to recover 1/2 of his costs; no other costs. Opinion per curiam. Notices mailed.

1975

Jan. 16 Mandate issued and copy filed. Notices mailed.

Mar. 26 Notice of filing petition for certiorari (74-1187) filed 3/19/75.

June 17 Certified copy of order from Supreme Court granting certiorari (6/9/75) [74-1187] filed.

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

[Title omitted in printing]

COMPLAINT

JURISDICTION

1. Jurisdiction in this matter arises under Title 28 USC 1343 and Title USC 1983, and also under the Constitution of the United States, in particular but not limited to, the First, Fifth, and Fourteenth Amendments thereto.

PARTIES

2. Plaintiff Nicholas A. Palmigiano is a resident of the Adult Correctional Institutions, Howard, Rhode Island, confined therein under sentence of a Court of Law.

3. Plaintiff Palmigiano is the same Nicholas A. Palmigiano who is the President of the National Prison Reform Association and who has brought other suits in Federal Court to redress the grievances of himself and other inmates, and the defendants are well aware of plaintiff Palmigiano's activities in the area of prison reform.

4. Defendants Baxter, Carney and Siner are officers and guards at the Adult Correctional Institutions, Howard, Rhode Island and on November 13, 1972 convened together as a hearing board, so called, to review charges brought against plaintiff Palmigiano for violations of prison regulations.

5. Defendant Howard is the warden of the Adult Correctional Institutions and as such is charged with the day-to-day supervision and administration of the Adult Correctional Institutions; defendant Remillard is the deputy warden of the Adult Correctional Institutions and as such assists defendant Howard in discharging his duties.

6. Defendants are sued individually and in their official capacities, and at all times complained of herein, the defendants were acting under color of law by virtue of their positions as state officials.

FACTS OF THE CASE

7. On or about November 11, 1972 at approximately 8:55 p.m., plaintiff Palmigiano attempted to secure medical assistance for another prisoner whom he believed to be seriously ill and who in fact was gasping for breath, vomiting, and convulsing; and plaintiff Palmigiano sought medical assistance by calling the attention of at least two prison officials to the plight of the sick man.

8. On or about November 11, 1972 and shortly after he had attempted to secure aid and assistance for the sick man, plaintiff Palmigiano was charged with a violation of prison discipline, specifically, "Inciting a disturbance and disruption of A.C.I. operations which might have resulted in a riot . . ."; plaintiff Palmigiano was further charged with being a threat to the security of the Institution and was advised that he should contact his attorney because criminal charges might be brought against him.

9. On November 13, 1972, defendants Baxter, Carney, and Siner, sitting as a disciplinary hearing board summoned plaintiff Palmigiano before them to answer the charges set forward in the preceding paragraph; defendant Remillard was present in the room in which the hearing board convened and in fact conferred with and advised and acted in concert with the hearing board.

10. Plaintiff Palmigiano appeared before defendants Baxter, Carney, Siner and Remillard accompanied by his attorney, Stephen J. Fortunato, Jr.; plaintiff Palmigiano was informed that he could not have an attorney present, at which point plaintiff Palmigiano and his attorney removed themselves from the room for a short period of time with the leave of the board.

11. While outside the hearing room and while conferring with his attorney, plaintiff Palmigiano was approached by defendant Remillard who introduced himself to plaintiff's attorney and said to the attorney that he could advise his client to remain mute but that plaintiff Palmigiano's silence would be considered adversely when the board considered its decision.

12. In fact, plaintiff Palmigiano's attorney did not attend the hearing and plaintiff Palmigiano informed defendants Baxter, Carney, Siner and Remillard that he chose to remain mute.

13. The defendants did not hear or consider any evidence whatsoever either for or against the plaintiff, and in fact, defendants Baxter, Carney and Siner found plaintiff Palmigiano guilty of the charges brought against him without receiving any evidence whatsoever; and upon their finding of guilty, defendants Baxter, Carney and Siner sentenced plaintiff Palmigiano to thirty days in the Behavioral Correctional Unit, also known as the B.C.U., segregation and the hole, and recommended that he be down-graded in classification at the end of the thirty days so that he would remain in the B.C.U. indefinitely; and defendants Baxter, Carney and Siner also recommended that plaintiff Palmigiano lose any and all good time that he had accumulated.

14. Defendant Remillard advised and acted in concert with defendants Baxter, Carney and Siner in rendering their decision and sentence, which was unwritten; defendant Howard ratified the board's decision without giving reasons; and the arbitrary actions of all the defendants were taken to punish plaintiff for exercising his right to seek redress in courts of law and speak publicly on prison reform.

15. The defendants declared that the hearing, so called, could not be delayed for any longer than one week.

16. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at a disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to be assisted by counsel when threatened with punishment in the form of loss of liberty and privileges by state officials.

17. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at the disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to counsel in that plaintiff was in a custodial situation, had been informed that criminal charges could and might be placed against him and if, in fact, he made any statements those statements could be used against him in a future criminal prosecution.

18. The actions of the defendants in conducting a disciplinary hearing at which they threatened to use and used plaintiff's silence as evidence of guilt and which hearing was conducted without giving plaintiff any assurance that no criminal charge would follow or that his statements would not be used against him at a future criminal trial, were in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

19. The actions of the defendants in finding the plaintiff guilty without considering any evidence whatsoever was in derogation of plaintiff's right not to be deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment, and Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff Palmigiano prays that this Court:

1. Declare the actions of the defendants in refusing him the assistance of counsel, to be unconstitutional and in derogation of his Fifth, Sixth and Fourteenth Amendment rights;

2. Declare the decision and sentence rendered by the defendants to be null and void on the grounds that plaintiff's right to due process of law was violated in that no evidence whatsoever was produced against him;

3. Declare the procedure followed by the board, namely, the drawing of adverse inferences, from the refusal of the plaintiff to make any statements, to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution;

4. Declare the convening of any disciplinary hearing based upon facts from which a criminal prosecution could be brought against plaintiff to be unconstitutional and in derogation of plaintiff's Fifth and Fourteenth Amendment rights, unless and until any criminal charge is disposed of or, in the alternative, the plaintiff is guaranteed by appropriate officials that no criminal charges will be placed against him arising out of any alleged incidents that also constitute an alleged violation of prison regulations;

5. Enjoin the defendants, each and every one of them, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them, from convening a disciplinary hearing and from punishing and threatening to punish plaintiff by confinement to the B.C.U., downgrading in classification or any other manner until plaintiff is assured that no criminal charge will be brought against him arising out of the same incident by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings;

6. Enjoin the defendants, each and every one of them, their agents, servants, employees, officers and attorneys

and all persons acting in concert with them, by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings, from prohibiting the plaintiff from having the assistance of counsel at any and all disciplinary hearings arising out of the incidents of November 11, 1972 and from punishing or threatening to punish the plaintiff without any evidence of guilt of a prison regulation violation whatsoever, and for exercising his constitutional right to remain silent in the face of charges brought against him;

7. Grant any other relief that this Court deems just and equitable.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

VERIFICATION

First being duly sworn, I, Nicholas A. Palmigiano, do declare and swear that I have read the foregoing Complaint and the facts alleged therein are true and correct.

(s) NICHOLAS A. PALMIGIANO
NICHOLAS A. PALMIGIANO

Subscribed and sworn to before me at Cranston, Rhode Island this 14th day of November, 1972.

(s) (ILLEGIBLE), *Notary Public*

[Title Omitted in Printing]

MOTION FOR A TEMPORARY RESTRAINING ORDER

Now comes the plaintiff in the above matter and moves this court on the basis of the facts set forth in his verified complaint which has been duly filed with the Clerk of this Court and also the affidavit affixed hereto as appendix "A"

to issue a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining and enjoining the defendants, each and every one of them, their employees, agents, servants, officers, attorneys, and all persons acting in concert with them from: punishing, threatening to punish, or harassing the plaintiff in any way for an alleged violation of prison regulations on November 11, 1972 and for allegedly being a threat to the security of the Adult Correctional Institutions on the grounds that:

1. Plaintiff, Nicholas A. Palmigiano, is being punished with a loss of liberty for thirty (30) days and a threatened loss of liberty for an indefinite period, as a result of a finding of guilty and a sentence thereon resulting from a hearing which received absolutely no evidence against him and which, in fact, considered his remaining silent as evidence of his guilt, in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments and his right to due process of law as secured by the Fourteenth Amendment;

2. Plaintiff, Nicholas A. Palmigiano, was deprived of his liberty and continues to be deprived of his liberty as a result of defendants' conducting a hearing at which plaintiff, Nicholas A. Palmigiano, was not allowed the assistance of his counsel, even though the loss of his liberty was threatened and even though a criminal prosecution could arise out of the very incident that was the subject of the disciplinary hearing conducted and sanctioned by the defendants, all in derogation of plaintiff's right to the assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The plaintiff further represents that he is being irreparably injured as a direct result of the actions of the defendants, in that his liberty of movement is restricted substantially and considerably when compared to the liberty he enjoyed prior to the hearing of November 13, 1972 and

while he was still a member of the general prison population, and that he also loses numerous other privileges, including visitation rights; the plaintiff further declares that time is of the essence and that should this Court grant the within motion for a temporary restraining order, the plaintiff will be spared from irreparable harm and the rights of the defendants will not in any way be prejudiced.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.
10 Jefferson Boulevard
Warwick, Rhode Island 02888

[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

APPENDIX "A"

AFFIDAVIT

First being duly sworn, I, Stephen J. Fortunato, Jr., do declare and swear that I am a member of the Bar of the Supreme Court of Rhode Island and of the United States District Court for the District of Rhode Island; that on November 13, 1972, I attempted to represent Nicholas A. Palmigiano, my client, at a disciplinary hearing being held at the Adult Correctional Institutions, Howard, Rhode Island; that I was informed by the defendants that counsel would not be permitted to remain during the hearing; that when I removed myself from the hearing room, along with my client, I was approached by the defendant, Roland P. Remillard, who informed me that I could inform my client to remain mute, but that his silence would be considered adversely in any decision made by the Hearing Board, and that his silence would be detrimental to his defense.

(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

[Jurat Omitted in Printing]

[Title Omitting in Printing]

PLAINTIFF'S AMENDED COMPLAINT

Jurisdiction

1. Jurisdiction in this matter arises under Title 28 USC 1343 and Title USC 1983, and also under the Constitution of the United States, in particular but not limited to, the First, Fifth, and Fourteenth Amendments thereto.

Parties

2. Plaintiff Nicholas A. Palmigiano is a resident of the Adult Correctional Institutions, Howard, Rhode Island, confined therein under sentence of a Court of Law.

3. Plaintiff Palmigiano is the same Nicholas A. Palmigiano who is the President of the National Prison Reform Association and who has brought other suits in Federal Court to redress the grievances of himself and other inmates, and the defendants are well aware of plaintiff Palmigiano's activities in the area of prison reform.

4. Defendants Baxter, Carney and Siner are officers and guards at the Adult Correctional Institutions, Howard, Rhode Island, and on November 13, 1972 convened together as a hearing board, so called, to review charges brought against plaintiff Palmigiano for violations of prison regulations.

5. Defendant Howard is the warden of the Adult Correctional Institutions and as such is charged with the day-to-day supervision and administration of the Adult Correctional Institutions; defendant Remillard is the deputy warden of the Adult Correctional Institutions and as such assists defendant Howard in discharging his duties.

6. Defendants are sued individually and in their official capacities, and at all times complained of herein, the defendants were acting under color of law by virtue of their positions as state officials.

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11. While outside the hearing room and while conferring with his attorney, plaintiff Palmigiano was approached by defendant Remillard who introduced himself to plaintiff's attorney and said to the attorney that he could advise his

client to remain mute but that plaintiff Palmigiano's silence would be considered adversely when the board considered its decision.

12. In fact, plaintiff Palmigiano's attorney did not attend the hearing and plaintiff Palmigiano informed defendants Baxter, Carney, Siner and Remillard that he chose to remain mute.

13. The defendants did not hear or consider any evidence whatsoever either for or against the plaintiff, and in fact, defendants Baxter, Carney and Siner found plaintiff Palmigiano guilty of the charges brought against him without receiving any evidence whatsoever; and upon their finding of guilty, defendants Baxter, Carney and Siner sentenced plaintiff Palmigiano to thirty days in the Behavioral Correctional Unit, also known as the B.C.U., segregation and the hole, and recommended that he be down-graded in classification at the end of the thirty days so that he would remain in the B.C.U. indefinitely; and defendants Baxter, Carney and Siner also recommended that plaintiff Palmigiano lose any and all good time that he had accumulated.

14. Defendant Remillard advised and acted in concert with defendants Baxter, Carney and Siner in rendering their decision and sentence, which was unwritten; defendant Howard ratified the board's decision without giving reasons; and the arbitrary actions of all the defendants were taken to punish plaintiff for exercising his right to seek redress in courts of law and speak publicly on prison reform.

15. The defendants declared that the hearing, so called, could not be delayed for any longer than one week.

16. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at a disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendments rights to be assisted by counsel when threatened with punishment in the form of loss of liberty and privileges by state officials.

17. The actions of the defendants in denying plaintiff Palmigiano the assistance of counsel at the disciplinary hearing were in derogation of plaintiff's Fifth, Sixth and Fourteenth Amendment rights to counsel in that plaintiff was in a custodial situation, had been informed that criminal charges could and might be placed against him and if, in fact, he made any statements those statements could be used against him in a future criminal prosecution.

18. The actions of the defendants in conducting a disciplinary hearing at which they threatened to use and used plaintiff's silence as evidence of guilt and which hearing was conducted without giving plaintiff any assurance that no criminal charge would follow or that his statements would not be used against him at a future criminal trial, were in derogation of plaintiff's right against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

19. The actions of the defendants in finding the plaintiff guilty without considering any evidence whatsoever was in derogation of plaintiff's right not to be deprived of his liberty without due process of law as guaranteed by the Fourteenth Amendment, and plaintiff has no adequate remedy at law.

20. The actions of the defendants as set forth above cause plaintiff irreparable injury in that they violate his fundamental rights, confine him to a cell for twenty-three hours a day, deprive him of all visiting privileges except with attorneys, cause him to lose the dollar per day he was earning as a prison barber, cause him to lose thirty days good time credit and put a black mark on his prison record that can and will be considered by the parole board and the classification board when plaintiff is eligible for parole or for admission to special rehabilitative programs or transfer to the minimum security section of the Adult Correctional Institutions.

WHEREFORE, plaintiff Palmigiano prays that this Court:

1. Declare the actions of the defendants in refusing him the assistance of counsel, to be unconstitutional and in derogation of his Fifth, Sixth and Fourteenth Amendment rights;

2. Declare the decision and sentence rendered by the defendants to be null and void on the grounds that plaintiff's right to due process of law was violated in that no evidence whatsoever was produced against him;

3. Declare the procedure followed by the board, namely the drawing of adverse inferences, from the refusal of the plaintiff to make any statements, to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution;

4. Declare the convening of any disciplinary hearing based upon facts from which a criminal prosecution could be brought against plaintiff to be unconstitutional and in derogation of plaintiff's Fifth and Fourteenth Amendment rights, unless and until any criminal charge is disposed of or, in the alternative, the plaintiff is guaranteed by appropriate officials that no criminal charges will be placed against him arising out of any alleged incidents that also constitute an alleged violation of prison regulations;

5. Enjoin the defendants, each and every one of them, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them, from convening a disciplinary hearing and from punishing and threatening to punish plaintiff by confinement to the B.C.U., downgrading in classification or any other manner until plaintiff is assured that no criminal charge will be brought against him arising out of the same incident by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings;

6. Enjoin the defendants, each and every one of them, their agents, servants, employees, officers and attorneys

and all persons acting in concert with them, by the issuance of a temporary restraining order, to be made into preliminary and permanent injunctions after appropriate proceedings, from prohibiting the plaintiff from having the assistance of counsel at any and all disciplinary hearings arising out of the incidents of November 11, 1972, and from punishing or threatening to punish the plaintiff without any evidence of guilt of a prison regulation violation whatsoever, and for exercising his constitutional right to remain silent in the face of charges brought against him;

7. Order the defendants to expunge from plaintiff's prison record all findings, decisions and descriptions of any kind pertaining to the events and happenings complained of herein;

8. Award plaintiff compensatory damages of ONE HUNDRED DOLLARS ($100.00) per day for every day he has spent in punitive segregation;

9. Award plaintiff the costs of this litigation, plus reasonable attorney's fees;

10. Grant any other relief that this Court deem just and equitable.

NICHOLAS A. PALMIGIANO
By his attorney,
(s) STEPHEN J. FORTUNATO, JR.
STEPHEN J. FORTUNATO, JR.

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

ANSWER

FIRST DEFENSE

The Plaintiff has failed to utilize the administrative remedies provided by the state.

SECOND DEFENSE

Plaintiff knowingly and by advice of counsel waived his right to a hearing. Plaintiff had no right to legal representation before the board.

THIRD DEFENSE

The complaint fails to state a claim under 42 U.S.C., §1983 and 28 U.S.C. §1343 upon which relief may be granted. Less than $10,000 is involved.

FOURTH DEFENSE

1. The defendants admit the allegations of paragraph 2, 4, 5, 8, 9, 10, 11 and 12 of the complaint.

(2) The defendants deny the allegations of paragraph 1, 6, 13, 14, 16, 17, 18 and 19 of the complaint.

(3) The defendants neither admit nor deny the allegations contained in paragraphs 7 and 15 of the complaint.

JOSEPH BAXTER, et als.
By their Solicitors,
RICHARD J. ISRAEL
Attorney General
W. SLATER ALLEN, JR.
(8) W. SLATER ALLEN, JR.
Assistant Attorney General

STENOGRAPHIC TRANSCRIPT OF HEARING

[1] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 5053
NICHOLAS A. PALMIGIANO
v.
JOSEPH BAXTER, et al.

Before his Honor, Judge Edward W. Day
Tuesday, November 21, 1972
Wednesday, November 22, 1972

APPEARANCES:

For the Plaintiff:
Stephen J. Fortunato, Jr., Esq.
Ellen Wilbur Katz, Esq.

For the Defendants:
W. Slater Allen, Esq.
Assistant Attorney General
State of Rhode Island
Edward F. Burke, Esq.
Department of Corrections

HEARING re PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

FIRST DAY
TUESDAY, NOVEMBER 21, 1972
10:10 A.M.

[2] The Clerk: Nicholas A. Palmigiano v. Joseph Baxter, et al.

Mr. Allen: Ready.

Mr. Fortunato: Ready.

The Court: You may proceed.

Mr. Fortunato: Good morning, your Honor.

May it please the Court, this matter is before this Court on a matter of preliminary relief sought by Nicholas Palmigiano, a man now detained at the Correctional Institutions at Howard, Rhode Island.

The first witness the plaintiff will call is Luther Gorton.

LUTHER C. GORTON, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Gorton, where are you employed? A. State Prison.

Q. What is your function at the State Prison? A. Correctional officer.

Q. How long have you been employed there? A. 13 years.

Q. Please describe for the Court your general duties at the State Prison? [3] A. Custody and control.

Q. What does that mean? A. Make sure they don't get out and don't get in any trouble.

Q. You are involved with the people under sentence at the ACI? A. Yes.

Q. Directing your attention to November 11th, 1972, were you on duty at the Adult Correctional Institutions that day? A. Yes, yes.

Mr. Fortunato: Will you speak a little bit louder, please?

The Witness: Yes.

Q. Which shift were you working that day? A. 4:00 to 12:00.

The Court: What is that, please?

The Witness: 4:00 to 12:00.

The Court: 4:00 p.m. till midnight?

The Witness: Yes.

Q. Do you know or are you acquainted in any way with a man named Nicholas Palmigiano? A. I have known him for about 10 years.

Q. Is he present in the courtroom today? A. Right here. (indicating)

Mr. Fortunato: He is the gentleman seated at the counsel table now.

Q. During the course of your duties on November 11th, 1972 did you [4] have any occasion to observe Mr. Palmigiano? A. Yes.

The Court: This is on November 11th?

The Witness: Yes.

Q. And as a result of your observations — and without going into any details of what you saw or did not see — did you make any charges for violations of prison rules against Mr. Palmigiano? A. Yes, I did.

Q. About what time did you make those charges? A. Oh, about — I didn't write them until after lockup.

The Court: You did not write them until after —

The Witness: — after lockup when I was free to do so.

The Court: What time was lockup?

The Witness: Supposed to be 9:00 o'clock.

Q. What time did you become free to write the charges up? A. About 9:30.

Q. And so far as the incident involved, about what you wrote the charges, what time did that incident occur? A. 10 minutes of 9:00.

Q. You say you wrote the charges up. Once you wrote the charges up, did you give the charges to anybody? A. Turned them over to Captain Brule.

Q. Did you physically write the charges up yourself or did somebody else type them up for you? A. I wrote them. [5] Q. Did you write them in longhand or type them up? A. Longhand, and they were typed by the clerk, and I signed it.

Q. Did you sign the copy that was typed by the clerk? A. Yes, I did.

Q. At what time had the clerk finished typing up the charges? A. Possibly 10:00 o'clock.

Q. Did you say you then turned those over to Deputy Warden Remillard? A. No, I gave them to Captain Brule.

Q. Captain Brule was the officer on duty that night? A. Yes.

Q. You have personal knowledge he works the same shift? A. Yes, he is my superior.

Q. Again, what time was it you gave them to Captain Brule? A. When I finished writing them: 9:30, 10:00 o'clock.

Q. Directing your attention to November 13th, 1972, did you have any occasion to appear before any disciplinary hearing board — A. No.

Q. (Continued) — to testify about what you observed? A. No.

Q. Did you have any conversation at any time whatsoever with Captain Baxter about what you observed that night? A. No.

Q. Did you have any conversation with a Mitchell Siner? A. No.

Q. And how about Norman Carney? [6] A. No.

Q. The only person you had contact with then about the charges was Captain Brule. Is that fair to say? A. I turned over the written report to him, yes.

Q. And that was your final connection with the case? A. Yes.

Mr. Allen: Your Honor please, due to some rather unusual circumstances, of which I would ask the Court to take judicial notice, — I am aware we have just sat down and just started — but my brother, Mr. Burke has just come in from working on the problems of staffing the Correctional Institutions, of which the Court may have

read in the paper. And Mr. Burke has asked me, as house counsel for the Department of Corrections, which is responsible for the operation of the ACI, that we have about a 15-minute recess so he could have an opportunity to confer with me about this case and advise me.

So I would request about a 15-minute recess, if I may. I know it is extraordinary.

The Court: Very well; we will take a 15-minute recess at this point.

(Recess)

Q. (By Mr. Fortunato) Mr. Gorton, you said that on the evening of November 11th you made a report regarding a violation that you allegedly observed committed by Mr. Palmigiano, and that the [7] clerk typed it up, and you signed a document to that effect. A. Yes.

Q. I show you a document. Can you identify that?

The Witness: When I get my glasses on.

(A pause)

A. There is some been added —

The Court: What is that?

A. (Continued) There is some been added since I put it. This here wasn't here, of course, and this wasn't here. (indicating)

Q. What is the title of that piece of paper, if you know? A. It is a booking report. We call it the book, disciplinary report.

Q. You call it the book. What would the full name of it be? A. Inmate disciplinary report.

The Court: Inmate disciplinary report.

A. (Continued) This part is mine. (indicating)

Q. About halfway down the page there is a signature on the paper. A. This? (indicating)

Q. Yes. A. That is mine.

Q. That is your signature? A. Yes.

Q. And you signed that referring to all of the typewritten words above your signature? A. This section here, yes. (indicating)

Q. Anything else below your signature you did not fill in. [8] A. No.

Mr. Fortunato: Your Honor, I am going to ask that this be marked as Plaintiff's Exhibit No. 1 for identification. At this time I would also ask that it come in as a full exhibit.

The Court: Which is it? You are offering it as a full exhibit?

Mr. Fortunato: Yes, I am.

Mr. Allen: No objection, your Honor.

The Court: Plaintiff's Exhibit 1.

Mr. Fortunato: I might state now we will have to have some other copies made, if that can be worked out with the Clerk, because I am advised this is the only copy the Attorney General's office was furnished with by their client, Warden Howard.

Mr. Allen: We have the original. We can make adequate copies for all persons.

Mr. Fortunato: I must have misunderstood, you Honor.

(Copy of document entitled "Inmate Disciplinary Report," dated November 11, 1972, re Nicholas Palmigiano, marked Plaintiff's Exhibit No. 1)

The Court: This is entitled —

The Clerk: "Inmate Disciplinary Report," dated November 11, 1972.

Q. Is that the only report that you made regarding the case? [9] A. No, I made another report of the whole incident, involving other people.

Q. But so far as Mr. Palmigiano was concerned, is that the only report you made regarding the case? A. His name was on the other report also.

Q. What names of other prisoners were on that other report, do you recall? A. There was another inmate on there: Alfredo Pelleccia.

Q. Did it arise out of the same incident?

The Court: What was that name again? Pelleccia? How do you spell that?

The Witness: I don't know.

The Court: I will take an educated guess on how to spell it.

Q. Showing you Plaintiff's Exhibit No. 1, and all the wording which is on this exhibit above your signature, is that a full and accurate statement of all the significant facts that you saw and observed? A. Pertaining to this one inmate, yes.

Q. Pertaining to that inmate? A. Yes.

Mr. Fortunato: Thank you.

Q It is true, so far as you are concerned, this is all you felt obliged to write down. A. I wrote another report too.

Q. So far as this inmate is concerned, — this is under your duties [10] at the Adult Correctional Institutions — this is what you felt obliged to put down here. A. Right.

The Court: Apart from the second report. Is that it?

The Witness: Yes.

Q. This is the report pertaining to Palmigiano, and what is the other report about? A. The other report pertains to him in part.

Q. And this is the Pelleccia report?

The Court: What?

Q. What is the other inmate's name? A. That is Alfredo Pelleccia.

Q. Did you attend any disciplinary hearings regarding Pelleccia? A. No.

The Court: Regarding Pelleccia?

The Witness: No.

The Court: Were there any disciplinary hearings regarding Pelleccia?

The Witness: Not yet, no.

The Court: He couldn't attend them then, could he?

Mr. Fortunato: I have no further questions.

Mr. Allen: No questions, your Honor.

The Court: You may step down.

Mr. Fortunato: Is Captain Baxter in the courtroom?

Mr. Burke: He is not, and I wish to explain his absence [11] to the Court.

The Court: Yes, sir.

Mr. Burke: Your Honor, I speak as — my name is Edward F. Burke. I have entered an appearance in this case and I speak as counsel for the State of Rhode Island, Department of Corrections.

Certain officers and officials of the State of Rhode Island, Department of Corrections, have been summonsed to testify in this case. I ask the Court to take judicial notice of the fact that yesterday, for a period of 24 hours, commencing at 12:01 a.m. and ending at midnight last night, the correctional officers of — large numbers of the correctional officers of the Adult Correctional Institutions reported sick.

As a result, the warden was compelled to keep on duty certain correctional officers who were on duty at midnight and to utilize superior officers of the department or supervisory personnel for the purpose of maintaining order within the Adult Correctional Institutions. In fact, Rhode Island State Police in large numbers were brought to the scene.

At midnight last night the shift scheduled to report at that time did report. There will be negotiations at 2:00 p.m. this afternoon involving the warden and other high officials of the Adult Correctional Institutions, the Governor, and the officers of the Correctional Officers Union.

Under the circumstances many of the officials, including [12] Warden Howard, worked round the clock yesterday. I am speaking in general because I am not referring just to the particular witness he just referred to, but to all the witnesses from the Adult Correctional Institutions under subpoena today.

It is the warden's feeling and the director's feeling, which I respectfully present to the Court, that because no one can predict what is going to happen this afternoon, because of the lack of rest of many of these men from yesterday, and because of the fact that orderly procedure is just now being restored in prison operations, that these men be excused from answering the subpoena until 10:00 o'clock tomorrow morning.

There were certain records that were requested to be brought. We have brought the records with us. We have brought a tape recording of the entire disciplinary board proceeding with us in response to the subpoena. But I respectfully request, in relation to the officials under the subpoena, that the matter be deferred until 10:00 o'clock tomorrow morning, at which time we will be ready to proceed.

The Court: Who are these particular individuals that are under summons? Captain Baxter?

Mr. Fortunato: Captain Baxter, your Honor, Warden Howard, and Ronald Brule.

The Court: Brule?

Mr. Fortunato: Yes. Mr. Gorton was also under subpoena.

[13] I would like to respond to what counsel just said, if I may, regarding a continuance of this matter.

Your Honor, of course, these men are all under subpoena. It was my understanding, as of our discussion in chambers yesterday when Mr. Allen was present, that if the strike were over today, we would be able to proceed

with the witnesses. And the problem, of course, in a case such as this, on the allegations made in the complaint, is that my client is now deprived of such liberties and privileges that he does have at the ACI; namely, he is under lock and key virtually 24 hours a day; does not have visitors, and all the rest of it.

We have contended this is all done without due process and we made the Fourteenth Amendment claims with which your Honor is familiar.

If I understand Mr. Burke correctly, he doesn't know what is going to happen at 2:00 o'clock, and they might go back on strike. Then where will we be tomorrow? The fact of the matter right now is people are not on strike. Captain Baxter, despite the plea of fatigue, I am advised by my client, was working at the prison as of this morning. It is only five of 11:00 right now. I don't know which of these men — I assume that the warden had to go to negotiations. I am not so sure these other people do.

We are approaching Thanksgiving on Thursday and I have asked, as I said, — I am not trying to be obstreperous here [14] or an obstructionist, or anything. But when I talked to counsel in the hallway, I said, "Look, if you need another day or two, just put Palmigiano, who has no prior problems at the prison, — put him back in the general population." They don't want to do that. They want to have their cake and eat it too.

I appreciate the burden of the state officials and the Attorney General's department, but I think sometimes private attorneys and people in the situation my client is in also face burdens, hardships, deadlines, fatigue, and all the rest of it.

I would strenuously object to any continuance. I can understand the warden not being here, but the other men are under subpoena and they should be brought here. This

is only a preliminary hearing. If they are unhappy with the results, they can pursue this to a hearing on the merits.

Mr. Burke: May I be heard just briefly in reply to what my brother has said?

We are simply requesting 24 hours in relation to complying with the subpoena. If the Court orders any of the individuals brought in, we will have them brought in as quickly as they can get here today.

I submit what is before the Court today is actually a balancing of equities. We are not asking for any untoward delay. This matter was scheduled for today. We are attempting to comply as far as the production of records is concerned.

[15] It is true Captain Brule and Captain Baxter will not participate in the negotiations. However, someone has to be left in charge of the prison while negotiations are going on. As my brother said, despite fatigue Captain Baxter is on duty today. This is correct, your Honor, but he is on duty within the prison; and what Mr. Fortunato is requesting is he be taken from that duty and brought in here at a time when the warden and top staff are all leaving right now in relation to negotiations to be held at 2:00 p.m. this afternoon.

Mr. Fortunato: I just might suggest — not to belabor the point — my client was brought in with a lieutenant who is also superior officer. I think the Court may judicially note, as far as the strike itself, Director Travisono was on television last night and was quoted in the paper that the prison functioned generally smoothly.

The Court: I am not interested in what was on television. I see no great harm in granting the request of counsel that the summons of Captains Baxter and Brule be complied with tomorrow.

Mr. Fortunato: May I request the Court order Mr. Palmigiano into the general population during this delay?

The Court: Your request is denied.

Mr. Fortunato: In that event, your Honor, we have nothing further today. I would ask that the habeas for Mr. Palmigiano to testify be continued in effect until tomorrow; [16] that he be brought in tomorrow for 10:00 a.m.

The Court: You haven't any other evidence you wish to present?

Mr. Fortunato: I don't think that I should. Because of the continuance requested by these gentlemen I don't think that I should have to put my case on out of order.

The Court: You represent the plaintiff here. The order of your witnesses is not material, it it? If you have other evidence to present, present it.

Mr. Fortunato: One moment, please, your Honor.

(A pause)

Nicholas Palmigiano.

NICHOLAS A. PALMIGIANO, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Palmigiano, you are currently detained under sentence of law at the Adult Correctional Institutions in Howard, Rhode Island? A. Yes.

Q. Prior to November 11th what classification did you have at the Adult Correctional Institutions? A. Classified to the barber shop.

The Court: What is that, please?

Q. In the barber shop, you say? A. Yes.

[17] The Court: Classified —

The Witness: — as a barber.

The Court: Classified as a barber. Had you been a barber before your confinement?

The Witness: Yes, your Honor.

Q. And so far as your contact with the rest of the inmate population, what unit were you in? A. Normal status, general population.

The Court: What is that again?

The Witness: Normal status of general population.

The Court: Normal status?

The Witness: Yes.

Q. Now would you briefly tell the Court some of the rights and privileges that go along with being in with the general status? A. Yes. Well, —

The Court: It is normal status, isn't it?

Q. General population, normal status? A. You are not confined to your cell, —

The Court: Not confined to your cell.

A. (Continued) — you are allowed visitors, meals in the mess hall.

The Court: You are allowed visitors.

A. (Continued) — meals in mess hall, recreation, and general freedom of movement.

Q. Were there any other activities at the prison that, as a member of the general population, you could engage in? [18] A. Yes, I am involved in the National —

The Court: A little louder, please.

A. (Continued) I am involved in the National Prison Reform Association.

The Court: You are involved in the —

The Witness: National Prison Reform Association.

The Court: National Prison Reform Association. Is that it?

The Witness: Yes, your Honor.

Q. How long have you been at the Adult Correctional Institutions? A. Approximately three and a half years.

Q. And from the time of your sentence until the present time —

Mr. Fortunato: Strike that.

Q. From the time of your sentence until November 11th were you in the general population, normal status? A. Yes, I was.

Q. Have you at any time prior to November 11th of this year been disciplined for any prison infractions? A. No.

Q. So it is fair to say you have a clean in-prison record. A. Yes, I have a clean record except for one incident: That there was a charge placed against me of bribery.

Q. That was — A. A criminal charge.

Q. It had nothing to do with in prison. A. It was — in prison is where I received the charge.

[19] Q. You have no disciplinary record in the prison? A. No.

TheCourt: You said there was a charge profferred against you.

The Witness: While I was in the Institution.

The Court: For some offense allegedly committed before you were in the Institution?

The Witness: No, while I was in the Institution.

The Court: A criminal charge?

The Witness: Yes, your Honor.

The Court: Is that still pending?

The Witness: Yes, your Honor. It is on appeal now.

The Court: But it was an offense allegedly committed while in prison.

The Witness: Yes, your Honor.

Q. For this offense you received no in-prison discipline? A. No.

Q. Now directing —

Mr. Fortunato: Strike that.

Q. What section of the prison do you have your cell in?

The Court: At the present time, you mean?

Mr. Fortunato: I am sorry. As of November 11th.

The Court: Prior to November 11th, up to —

Q. Up to and including November 11th what section of the prison did you have your cell in? [20] A. I believe it was South State Wing.

The Court: South State Wing, which doesn't mean much to me, I confess. What is meant by South State Wing?

The Witness: They have — your Honor, they have two sections, North State and South State, two separate blocks.

Q. And are there floors to these blocks? A. Yes, there is three tiers high.

Q. Which tier were you on? A. I was up on the third tier.

Q. How many cells would be adjoining yours in either direction and facing the same direction? A. There is eight cells on each tier.

Q. So you were one of eight cells on the third tier. Is that it? A. Yes.

Q. Directing your attention to November 11th, 1972, on or around 8:30 o'clock, quarter of 9:00, in the evening were you in the South State Wing? A. Yes, I was.

Q. And did you have any occasion to see Mr. Gorton, a correctional officer, present there — Luther Gorton? A. Yes, I did.

Mr. Allen: Object. Move to strike.

The Court: What is the basis of your motion?

Mr. Allen: Your Honor please, the allegations of the complaint are that the plaintiff has been deprived of a civil [21] right secured to him by 42 U.S. Code 1983; to wit, the right to a hearing. The subject matter underlying that hearing, it seems to me, is irrelevant and is of no assistance to the Court whatsoever. It seems irrelevant whether this man committed a physical assault or whether he did some other thing for which he was required to be disciplined or charged.

We have no objection to the admission of evidence of the charge because this is a portion of the administrative proceeding for the administration of discipline and security in the prison. However, the underlying facts, it would seem to me, are irrelevant and time-consuming and, I think, add nothing to this case.

Mr. Fortunato: Your Honor, I have no intention whatsoever of going into the incidents surrounding the infraction. I am merely trying to lay a little foundation of background so the Court generally knows who is involved in this controversy. I am not going to get into the substance of the charge and any defenses Mr. Palmigiano might have to it, or anything of that nature.

The Court: Within that limited scope I will allow it.

Q. You did see Mr. Gorton on duty that night? A. Yes, I did.

Q. Did there come a time during the course of the evening of November 11th, 1972 when Mr. Gorton, or any other correctional officer, informed you that you were in violation of some prison [22] regulation? A. Well, approximately 9:30, 25 minutes of 10:00, Mr. Gorton passed by my cell and said he would have to write a book on me.

The Court: What is that?

The Witness: He said he would have to write a book on me.

Q. Were you locked in your cell at this time? A. Yes, I was.

Q. Is that normal procedure at the prison: When the inmates go to bed they are locked in? A. Yes, sir.

Q. So you and everybody else in South State Wing were locked in. A. Yes.

Q. And Mr. Gorton passed by your cell. A. Yes.

Q. What did he say to you? A. He said he would have to write a book on me.

Q. What does that mean? A. That means that I would be put on disciplinary. He would have to write a report on me for an alleged violation.

Q. At that time did he hand you any papers? A. No.

Q. Did he tell you what the charge would be? A. No.

Q. Did you have any other conversation other than that he would [23] have to write a book on you? A. No, that is all.

Q. Did you see Mr. Gorton again that evening? A. I seen him but I didn't speak with him.

Q. Did any other officer or member of the staff at the Adult Correctional Institutions, after you were locked in your cell that evening, have occasion to come to your cell? A. Yes.

Q. Who was that? A. Captain Brule.

Q. Did you have any conversation with him? A. He came up to my cell approximately — it may have been between 11:00, 11:30, and he read the booking offense.

The Court: He read what?

The Witness: — the booking offense that Mr. Gorton had wrote.

The Court: Booking —

The Witness: Yes, the alleged offense.

The Court: Read the booking offense.

Q. Did he give you a copy of any papers at that time? A. No, he didn't.

Q. And do you recall what he told you you would be charged with? A. I believe it was creating a disturbance with a possible riot as a result of the disturbance. And he also says that I should contact my attorney because possible criminal charges may be [24] placed against me.

Q. Did you have any further conversation with him? A. No, that was all.

Q. About how long did this conversation take place? A. Approximately five minutes.

Q. And were you brought before a disciplinary board on November 13th, 1972? A. Yes, I was.

Q. And between November 11th, 1972 and the time that you were brought before the disciplinary board were you furnished with any papers informing you of any charges against you? A. I myself was never furnished with a copy of the booking. I believe a copy of the report was given to a Bobby Flint.

The Court: A copy of the report was given to a Bobby Flynn?

Q. Is that Flint? A. Flint.

The Court: Who is he?

The Witness: He is a member of the National Prison Reform Association.

Q. He is under sentence at the ACI, isn't he? A. Yes.

The Court: A copy of the report was given to Flint who is a prisoner?

The Witness: Yes.

The Court: Is his cell near yours?

[25] The Witness: No, he is in another block from mine, your Honor.

The Court: You say he is an officer of what?

The Witness: He is a member of the National Prison Reform Association.

Q. Now approximately what time on November 13th, 1972 did the disciplinary hearing commence?

The Court: How did you know it was given to Robert Flint?

The Witness: Well, your Honor, we have a procedure where the inmates may represent the inmates at a disciplinary hearing, and Bobby Flint is a member on that committee that handles all the disciplinary procedures. So it became a practice in the institution if an inmate was booked or disciplinary action being taken against him, they forwarded the reports to the National Prison Reform

Association office where the inmate has a choice. He will have either an inmate represent him or a classification officer represent him at the hearing.

The Court: You were asking a question. I interrupted you, did I?

Q. Approximately what time on November 13th, 1972 did the disciplinary hearing commence? A. I believe it was somewhere around 2:10, 2:30.

Q. Now from the —

The Court: What?

The Witness: About 10 minutes after 2:00 or 2:30.

[26] Q. From the time on November 11th when you were first advised that you would be charged until the time on November 13th when the hearing was to commence, was anything done to you in terms of your — general terms of your status at the prison? A. Yes. Captain Brule had says that in his opinion I was a definite threat to the institution.

The Court: Captain Brule what?

The Witness: In his opinion said that I was a definite threat to the institution and I was to be locked in my cell and fed in until I received the disciplinary report.

Q. So from the evening of November 11th until the hearing you were locked in your cell in South State? A. Yes.

Q. When had Captain Brule told you that he thought you were a threat to the security? A. Approximately 11:30 that Saturday evning. That would be the 11th.

Q. That would be the 11th. How many times did he come to your cell that evening? A. Once; one time.

Q. As of the time that he came that was after Mr. Gorton came? A. Mr. Gorton came by and says he would have to write a report on me.

Q. After Mr. Gorton came Mr. Brule came. A. Mr. Brule later came.

Q. Sometime around — [27] A. 11:00, 11:30.

Q. At least before midnight. A. Before midnight.

Q. And now between the 11th and the hearing did you get out of your cell for any occasions? A. Only to see my attorney.

The Court: What?

The Witness: Only to see my attorney.

The Court: When was that?

The Witness: The 12th, your Honor.

Q. Did you see any — you saw an attorney on the 12th? A. Yes. No, it was a Sunday. No. I am sorry; Monday. It would be the 13th.

The Witness: I am sorry, your Honor. It would be the 13th.

Q. Is it possible you might have seen — which attorney did you see on the 13th? A. I spoke with the — I spoke with you, Mr. Fortunato.

The Court: Is it on Sunday or Monday? The hearing was on Monday, wasn't it?

Mr. Fortunato: Right.

The Witness: This was a Monday morning, I believe. Yes, your Honor. That would be the 13th.

Q. Is it possible you saw another attorney on Sunday? A. Yes, I did. On Sunday I seen Miss Allegra Munson.

[28] The Court: That was on Saturday?

The Witness: On Sunday, your Honor.

The Court: What time was that?

The Witness: It was in the morning, your Honor, I believe; probably 9:30, 10:00 o'clock.

The Court: Wes she called by you or did someone call her to come to see you?

Th Witness: No, I had called for her, your Honor.

Q. You had called for her. When did you call for her?

The Witness: Why?

The Court: No; when and how.

The Witness: I think I called in the morning, around 10:00 o'clock.

The Court: You had access to the telephone then on Saturday morning?

The Witness: They told me that because of criminal charges, that I should contact my attorney; and they allowed me to make the phone call.

Q. They allowed you to make the phone call on Sunday morning?

The Witness: Sunday morning.

The Court: And you called Miss Munson?

The Witness: Yes, your Honor.

Mr. Allen: Just to be of assistance to the Court, I would offer to the Court Miss Munson is a member of the State Public Defender's Department, an attorney with that department.

[29] The Court: State Public Defender. I see.

Q. Between November 11th and the time of your hearing on the 13th did you have normal visiting privileges; that is, people who weren't attorneys? A. Yes.

The Court: You had normal visiting privileges in the meantime.

Q. But the major restriction then was you were confined to your cell. A. The major restriction: I was confined to the cell.

Q. You couldn't participate in any recreation or do NPRA work or anything of that nature. A. No.

Q. Directing your attention to the hearing about — approximately what time on November 13th did the hearing commence? A. I said approximately 10 minutes after 2:00 to 2:30.

Q. Who were the gentlemen that coexisted or that made up the hearing board? A. I believe Captain Baxter was the chairman, Officer Carney, and Classification Officer Mr. Siner.

Q. When you entered the hearing room did anybody accompany you into the room? A. Yes, my attorney, Mr. Stephen Fortunato.

Q. Meaning me?

The Court: Your present counsel?

[30] The Witness: Yes, your Honor.

The Court: That was in the hearing room?

The Witness: Yes, your Honor.

Q. And did any conversation ensue among the people present; namely, the hearing board, yourself, and myself? A. Yes, there was conversation.

Q. You could hear all the conversation that went on? A. Yes, I was present.

Q. Did Captain — what did Captain Baxter have to say about the people then present? A. Captain Baxter says that there are no attorneys allowed.

The Court: Baxter said —

The Witness: — that there are no attorneys allowed at these hearings and that Mr. Fortunato would have to leave.

Q. Did there come a time when you observed me leave the room? A. Yes. At that point we asked to be excused for a few minutes, and you and I —

The Court: "We," meaning whom?

The Witness: Myself and counsel.

Q. Where did we go when we left the room? A. We stepped outside the disciplinary room in what is called the rear hall.

Q. Sidetracking here for a minute, going back into the room, were any other prison officials present with Mr. Baxter, Mr. Carney, and Mr. Siner? [31] A. Yes, Deputy Warden Roland P. Remillard.

Q. He was present in the room when you first went into it? A. Yes.

Q. Going to the time when you say you and I came back out of the room, you say we stepped into the hallway. A. Yes.

Q. Did any other person join us at that time? A. Yes, Deputy Warden Remillard walked out in the — walked up to both of us. He introduced himself —

The Court: You mean he left the room?

The Witness: He left the room where myself and counsel were engaged in conversation. A. (Continued) He walked up to Mr. Fortunato and introduced himself as the deputy of the institution. At that time he says, "You may advise your client to remain mute but it would be detrimental to his defense."

The Court: "You may advise your client to remain mute but it will be detrimental to his defense"?

The Witness: Yes, your Honor.

Q. Did there come a time when Mr. Remillard absented himself from our conversation? A. Yes.

Q. And then approximately how long were you out in the hall speaking to me? A. Approximately five to ten minutes.

[32] Q. When we had concluded our conversation where did we go? A. Went back into the disciplinary room, and at that time I believe

The Court: Both of you went back into the disciplinary room?

The Witness: Yes, your Honor.

A. (Continued) And I believe at that time that Mr. Fortunato — we were recording the disciplinary proceedings.

The Court: You were what?

The Witness: We were recording, tape recording.

The Court: Who was recording?

The Witness: We were, yuor Honor.

The Court: Meaning whom?

The Witness: National Prison Reform Association; namely, Robert Flint.

The Court: What?

The Witness: Robert Flint.

The Court: Was he there too?

The Witness: Yes, your Honor.

The Court: Was he in the room?

The Witness: Yes, your Honor.

The Court: What was he doing in there?

The Witness: He was recording the proceedings.

Q. As you sit here today, that is your present recollection of what went on in these proceedings that we have been discussing? A. Yes.

[33] Q. After our conversation you say you and I both went back into the hearing room. A. Yes.

The Court: Flint had some sort of recording device?

The Witness: Yes, he had the tape recorder there, your Honor.

Q. And what was the substance of any conversation that you recall took place at that time? A. Well, to the best of my recollection I believe there was some stating about we did not recognize this as a disciplinary board.

The Court: What is that again?

The Witness: About that we did not recognize this as a disciplinary board.

The Court: Who is "we"?

The Witness: My attorney.

The Court: Who made the statement?

The Witness: Mr. Fortunato.

The Court: — made the statement that he did not what — give it to us again.

The Witness: — recognize this as a disciplinary board.

The Court: Yes?

The Witness: And I don't recall the entire conversation, your Honor. A. (Continued) Then after the conclusion of that conversation —

The Court: There was more to it than that, wasn't there?

[34] The Witness: Yes, your Honor, but I don't recall it verbatim.

The Court: What?

The Witness: I don't recall it verbatim actually what took place.

Q. Tell the Court what the substance of the conversation was. A. We strongly objected —

The Court: "We," meaning you and your counsel?

The Witness: Yes, me and my counsel.

A. (Continued) We strongly objected to the fact that my attorney could not remain present during these proceedings and that we are going to proceed with the hearing.

The Court: "We are going to." Meaning you?

The Witness: Yes, your Honor.

A. (Continued) So at that point we asked to be excused again for a few minutes and we went back out into the corridor. And on advice of my attorney, you know, I remained mute at the hearing.

The Court: You went back into the corridor?

The Witness: Yes, your Honor.

The Court: Then what?

The Witness: On advice of my attorney I remained mute. He left and I went back into the disciplinary board.

Q. As a result of the second conversation that took place in the hallway between you and me, was it the intention then to go through the hearing but to remain mute? [35] A. Yes.

The Court: What is that?

Q. Was it the intention for you to go back in and sit through the hearing but to remain mute? A. Yes.

Q. Did you in fact go back into the hearing room? A. Yes, I did.

Q. And at that time the hearing board was sitting? A. Yes.

Q. Namely Mr. Baxter, Mr. Carney, Mr. Siner? A. Yes.

Q. And you were not accompanied into the room at this time by me? A. No, I wasn't.

Q. Nor by any attorney? A. Nor by any attorney.

Q. What if anything did the members of the board have to say to you? A. Captain Baxter read the offense —

The Court: Captain Baxter read —

The Witness: — read the offense.

The Court: — read the statement of the offense?

The Witness: Yes.

A. (Continued) — and asked me if I was going to answer any questions. And at that time I again requested permission for my attorney to be present. He said, "Your request is denied." I says, "I remain mute." And then at that point he asked me to [36] step out of the room, which I did for approximately three to four minutes. And then I got called back into the disciplinary room. I sat down, and Captain Baxter says, "We find you guilty." He says, "We sentence you to 30 days, BCU, and possible downgrade in classification."

Q. Now while you were in the room, after you had talked to me for the second time and had gone back in, and right after Captain Baxter read you the charges, did any other officer of the Adult Correctional Institutions come forward to testify before this board? A. No.

Q. Did any inmate at the Adult Correctional Institutions testify at this board? A. No.

Q. Now on both these occasions I mean did anybody — officer of the Correctional Institutions or inmate at any time testify for or against you at this board? A. No.

The Court: You are telling me that no testimony whatever was presented?

The Witness: None, your Honor.

Q. Were any photographs presented into evidence in front of this board? A. No.

Q. Were any tape recordings presented into evidence at this board? [37] A. No.

Q. Did Captain Baxter or any other official present tell you that you had a right to remain silent? A. No.

Q. Did anybody tell you that anything that you said in those proceedings might be and perhaps would be, could be, used against you in a future criminal proceeding? A. Yes, Captain Baxter.

The Court: Captain Baxter told you what?

The Witness: That anything that I say here may be used against me in a court of law.

Q. Were you told that you had the right to counsel? A. No.

Q. Were you told that if you could not afford counsel, counsel would be provided for you? A. No.

Q. Now is it fair to say then that after the charges were read to you and after you said that you wanted to — you were going to remain silent, you were then told to remove yourself from the room? A. Yes.

Q. How long did you remain outside the room? A. Approximately three to four minutes.

The Court: Did you have to go back in?

The Witness: They called me.

[38] Q. When you got back into the room, who if anybody spoke to you? A. Captain Baxter.

Q. What did Captain Baxter say? A. Well, his exact words was "We find you guilty; 30 days BCU, possible downgrade in classification." And at that time he asked: Do I appeal.

The Court: He did what?

The Witness: At that time he asked if I appealed.

A. (Continued) Bobby Flint, who was recording the entire proceedings, says that he strenuously objected to the entire proceedings of this board.

The Court: Flint said he did?

The Witness: Yes.

A. (Continued) And Captain Baxter immediately said, "Your appeal is noted." And I was sent back to my cell under the same status: Locked and fed.

The Court: When you were asked if you appealed, what was your answer?

The Witness: I remained mute, your Honor.

The Court: You remained mute?

The Witness: Yes.

The Court: You didn't answer that question either?

The Witness: No.

The Court: Then you said Flint said he —

The Witness: Bobby Flint said he objected strenuously to [39] the entire proceedings.

The Court: What standing did he have to object? What was he doing there anyway?

The Witness: He was there as an NPRA representative, your Honor, which is a procedure that has been established at the institution.

Q. Now you said that you were sentenced to 30 days at the BCU. What is the BCU? A. Behavior Correctional Unit. I was sentenced to — actually it is the hole, but they call it the Behavior Correctional Unit.

The Court: Behavior —

The Witness: Behavior Correctional Unit.

The Court: You say actually it is the hole?

The Witness: Yes, Your Honor.

The Court: Meaning what?

The Witness: Well, you know, you are confined 24 hours a day. You are not allowed cigarettes, visits. You are allowed to receive mail and send mail. And you are allowed — and the only visits that you are allowed is an attorney.

The Court: The only visitor you are allowed —

The Witness: — is an attorney.

Q. Are you presently in this Behavior Correctional Unit? A. Yes.

Q. And since what date have you been there? A. The date — I believe it was Tuesday, the 14th.

[40] Q. Since Tuesday, the 14th, you have been there and you are still there now. A. Yes.

Q. And you have never left that place in between the 14th and today's date? A. No.

Q. Obviously to come here. But when you are out there, you are in the Behavior Correctional Unit? A. Correct.

Q. Now when Captain Baxter said that they found you guilty and that you were going to be sentenced to the BCU and perhaps be downgraded, what does the downgrading mean? A. Possibly classify me back in BCU.

Q. In other words, keep you there after the 30 days? A. Keep me there after the 30 days.

Q. If you know, would you tell the Court whether or not these disciplinary proceedings and findings become part of your permanent record at the ACI? A. Yes, it does.

Q. Will that be furnished when and if you become eligible for parole to the Parole Board? A. I believe it will.

Q. Now when Captain Baxter said that you were guilty and explained the sentence to you, did he at that time give you any piece of paper? [41] A. No.

Q. Have you ever received a piece of paper setting forth the decision and any reasons for the decision? A. No.

Q. Did Captain Baxter tell you any reasons for his decision? A. No.

Q. Did he tell you any facts that they had concluded against you? A. No.

Q. Now did there come a time when Warden Howard reviewed the findings and the sentence of the disciplinary board? A. Well, I couldn't actually say if he reviewed it, but approximately 5:00 o'clock, Tuesday, the 14th, an officer came up to my cell and said that the warden wanted to see me.

The Court: An officer came up to your cell and said that the warden wanted to see you?

The Witness: Yes, your Honor.

A. (Continued) I was brought to the deputy's office with Lieutenant Detonnancourt, and Warden Howard says, "I am here on your appeal"; and he says, "I am going to deny the appeal." I says, "Okay," and I went down to the BC Unit from there.

Q. From your conversation with the warden you went right to the BCU? A. Right to the BCU.

Q. While you were present with the warden did anybody, inmate or guard, testify for or against you? [42] A. No.

Q. Were any pictures or tapes offered into evidence against you? A. No.

The Court: That is while he was with Warden Howard?

Mr. Fortunato: While he was with Warden Howard; yes, sir.

Q. Did the warden hand you any piece of paper at that time? A. No.

The Court: What do you mean by a piece of paper?

Mr. Fortunato: Just did he give him any papers or documents at that time? A. (Continued) No.

Q. At any time have you received any papers or documents from the warden regarding your confinement in the BCU? A. No.

Q. Did the warden tell you any reosons why he was going to uphold the board? A. No reason.

Mr. Fortunato: I would like a moment, please, your Honor.

The Court: Certainly.

(A pause)

Q. Did the warden, when you were brought before him, — did he tell you you had a right to remain silent? A. No.

Q. Did he tell you anything you said might be used against you in a court of law in future criminal proceedings? [43] A. No.

Q. Did he tell you you had a right to counsel? A. No.

Q. Did he tell you you had a right to appointed counsel if you could not afford one of your own? A. No.

Q. What documents or papers of any type have you been furnished directly by any prison official regarding the disciplinary proceedings resulting from the incident of November 11th? A. None whatsoever.

Mr. Fortunato: I have nothing further.

Cross-Eximination by Mr. Allen

XQ. Mr. Palmigiano, you are, of course, the same person who was sentenced by the Superior Court for Providence County, State of Rhode Island, on September 14th, 1970 to life? A. Yes.

XQ. And you have since been found guilty by a jury in Providence County Superior Court of attempted bribery, have you not?

Mr. Fortunato: Objection, your Honor.

Mr. Allen: I don't think the appeal prevents my asking that question.

The Court: Ordinarily a conviction is to be shown for one purpose and that is to impeach a witness's credibility. And unless and until a conviction is final, I don't think it is [44] a proper basis for use for impeachment purposes.

Mr. Allen: Very good, your Honor.

XQ. Now let's talk about you for a minute, Mr. Palmigiano. You were for a long time the president of the prison Jaycees, weren't you? A. Yes.

Mr. Allen: Speak right up so the Judge can hear you, if you will, please.

XQ. And you subsequently were one of the founders of this organization called National Prison Reform Association. A. Yes.

XQ. And you are presently the president of it. A. Yes.

XQ. You were also the plaintiff in a class action, a civil rights action, which was called *Palmigiano* v. *Travisono*. Is that right? A. Pertaining to the National Prison Reform Association or an A-and-T case?

XQ. An A-and-T case. A. *Palmigiano* v. *Travisono*.

The Court: What is that again?

The Witness: *Palmigiano* v. *Travisono*.

Mr. Fortunato: Reported at 317 F. Supp., I believe, your Honor.

XQ. And you were a subscriber to the National Prison Reform Association case in this court, weren't you? [45] A. Yes.

XQ. You have been very active in prisoners' civil rights, haven't you, Mr. Palmigiano, ever since you went there? A. Yes.

XQ. Mr. Palmigiano, you recall a year or so ago —

The Court: A year or so ago? That would be November '71.

XQ. (Continued) — that this court adopted a document, a preliminary document, called the Morris Rules. Do you remember that?

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: I don't think it has been established he was a plaintiff in that matter.

Mr. Allen: I am not asking him that question.

Mr. Fortunato: Then I think it calls for a conclusion on law and administrative regulations by a non-expert.

Mr. Allen: I asked him whether he became aware of the Morris Rules, your Honor.

The Court: I think that is a fair inquiry.

A. Yes.

XQ. In fact, isn't it so, Mr. Palmigiano, you became intimately familiar with the originial Morris Rules yourself? A. No.

XQ. No? Now subsequently you became aware that this court approved a final draft of the Morris Rules. Is that correct? You became [46] aware of that? A. That this court approved a final draft of the Morris Rules?

XQ. Yes. A. Yes.

XQ. I am going to show you a document and ask you if you can tell what it is. Do you recognize that document? A. Yes, this is the new rules that the court adopted.

XQ. Those are the Morris Rules, aren't they? A. Those are the Morris Rules.

Mr. Allen: I would ask they be marked for identification at this time, your Honor.

The Court: They may be marked Defendants' Exhibit A for identification.

The Witness: Your Honor is it permissible if I have a minute with my attorney?

The Court: What is that?

The Witness: Is it permissible if I ask for a moment with my attorney?

Mr. Allen: This man is under cross-examination.

The Court: No, you are under cross-examination. You are the witness.

Defendants' A for identification.

(Copy of document entitled "Regulations Governing Disciplinary, Classification, and Mail Procedures for

all Inmates at [47] the Adult Correctional Institutions, State of Rhode Island," marked Defendants' Exhibit A for identification)

XQ. Do you own a copy of those rules, Mr. Palmigiano? A. I have a copy of it, yes.

XQ. Now you are the president of National Prison Reform, aren't you? A. Yes.

XQ. And you have been since its founding. A. Yes.

XQ. Will you tell the Court more in —

Mr. Allen: Well, I will withdraw that question.

XQ. Now did you become aware in advance of the adoption of Respondents' Exhibit A for id. by this court — did you become aware that this court invited comment on the rules? A. The best of my recollection: These adopted rules — they were strongly protested by the inmates.

The Court: They were what?

The Witness: They were strongly protested and objected to by the inmates and by the plaintiffs of the original petition against — Morris v. — I believe it was Affleck at that time.

The Court: That is something somebody told you?

The Witness: No, this is something I myself objected to — some of these proceedings.

XQ. You yourself objected to some of the rules?

The Witness: Yes.

[48] The Court: Those rules were approved by Judge Pettine.

The Witness: They were approved by Chief Judge Raymond J. Pettine; yes.

XQ. You at no time elected to be excluded from the class of persons in that lawsuit, did you?

Mr. Fortunato: Objection.

Mr. Allen: That is a factual matter, your Honor. It is a Rule 23 —

Mr. Fortunato: I think it is irrelevant to the proceedings now going on in this court, your Honor.

The Court: I can conceive where it might have some relevancy. The witness has said he objected to at least some of these rules.

The Witness: Yes, your Honor.

XQ. Now I am asking you, Mr. Palmigiano: Did you elect to be excluded from the class of persons covered by those rules? Did you file a notice with this court asking to be excluded from the class? A. No.

Mr. Fortunato: Objection.

The Court: You said you didn't?

The Witness: No.

The Court: He did not.

XQ. Now since the National Prison Reform Association has come into being and you have taken responsibility for the presidency of it, [49] will you tell the Court in some detail to what extent the National Prison Reform Association under your leadership takes some responsibility or some leadership in administering the Morris Rules? What do you do? A. Well, in answer to that question, the National Prison Reform Association had cards printed up for the entire population in regards to the booking procedures and the Morris Rules. We inform all our members and all the inmates of the institution that if he was under any disciplinary proceedings, if an officer was writing up a book against him, not to compound the incident, not to give the officer any backtalk, and he would contact one of the NPRA members for assistance.

We recently had a meeting with — Mr. Burke, I believe, was present and a few other gentlemen on the entire Morris rulings. And we have a complete transcript of them rules.

XQ. Now when you had Bobby Flint in the hearing room with you, that was pursuant to this arrangement that you

set up — the NPRA set up with the prison authorities, wasn't it?

Mr. Fortunato: Objection.

A. No, it wasn't.

Mr. Fortunato: Objection. I move to strike to the degree the answer has been recorded.

The Court: What is your objection?

Mr. Fortunato: Relevancy, your Honor. Whatever the rules now in force might be or this man's understanding of them, I [50] don't think that they are germane as far as his understanding is concerned to the question that this Court faces regarding violations of due process that we allege in a situation where, again, we allege that a man is faced with disciplinary proceedings at the same time that he is faced with criminal proceedings, and where we also allege that there was no evidence whatsoever produced against him.

In other words, I think the complaint on its face does not quibble about the nuances of the Morris Rules, but gets into issues other than this line of questioning.

So that is why I press my objection, your Honor.

Mr. Allen: Your Honor please, one of the thrusts of this complaint has been lack of representation. I am trying to show, and I think I will show, either through this witness or other, that this witness, this plaintiff, has made his own bed with a great deal of enthusiasm and now he finds it isn't as comfortable as he thought it was, and he is asking the Court to undo his own concoction.

The Court: There is no jury here and I think I can sift out any evidence that has no bearing. I am inclined to allow the question.

"When Bobby Flint was in the hearing room . . ." What was the balance of the question?

(Last question and answer read)

Mr. Allen: All right, Mr. Palmigiano.

[51] XQ. After these rules became effective you testified on direct examination that you made an arrangement with the classification officers that the notice, instead of going to the prisoner, goes to the NPRA, and you are the president of the NPRA. Didn't you testify to that effect?

Mr. Fortunato: That is a misstatement of what he testified to.

The Court: Substantially that is what my recollection was.

Mr. Fortunato: He said that Flint got it, but I don't know whether he said anything about pursuant to an arrangement he had made with Flint or anybody else.

Mr. Allen: I press my question.

The Court: If there is any doubt, let's have the record checked. My notes indicate there was an arrangement whereby the complaint was not to be given to the prisoner, but, rather, to the Association.

(Previous testimony read as follows:

"The Court: How did you know it was given to Robert Flint?

"The Witness: Well, your Honor, we have a procedure where the inmates may represent the inmates at a disciplinary hearing, and Bobby Flint was a member on that committee that handles all the disciplinary procedures. So it became a practice in the institution if an inmate was booked or disciplinary action being [52] taken against him, they forwarded the reports to the National Prison Reform Association office where the inmate has a choice. He will have either an inmate represent him or a classification officer represent him at the hearing.")

The Court: That was my recollection of his testimony.

Mr. Allen: I press my question. May I have the question read back, please, your Honor?

(Last question read)

A. Yes.

XQ. So that the reason Bobby Flint got the notice, and not you, is because it was consistent with a system which you yourself had devised. Isn't that correct? A. Yes.

XQ. And that is in turn consistent with Rule G on page 17 of the Morris Rules, is it not?

The Court: Rule what, G?

Mr. Allen: G as in "George," your Honor.

The Court: Page 17?

Mr. Allen: On page 17.

A. Yes.

XQ. And your attorneys, Mr. Coen and Mr. Roney, subscribed to these rules, did they not?

Mr. Fortunato: Objection, your Honor.

The Court: What is the objection?

[53] Mr. Fortunato: I am somewhat confused. I am not sure any foundation has been laid regarding his relationship to any other attorneys in any other case and what they were authorized to do, to not do, to bind this man in all circumstances, in all proceedings, that take place at the ACI.

Mr. Allen: It was a Rule 23 class action. This court formed the class, of which this plaintiff was a member, and he is bound by that judgment. And his counsel agreed to these rules. In fact, they participated in drafting them.

The Court: A moment ago you pointed out some subdivision on page 17.

Mr. Allen: G as in "George," your Honor.

The Court: "Any inmate being charged . . ."?

Mr. Allen: Yes.

The Court: A while back I understood the witness to deny he filed a motion to be excluded from the class of plaintiffs in the Palmigiano suit;—

Mr. Allen: That is right, your Honor.

The Court: — that he was a member of that class; it was a class action. And counsel for the class were who?

Mr. Allen: Coen and Roney, your Honor.

The Court: For whatever limited weight may be properly afforded to it, I think it is proper inquiry. I will allow it.

Mr. Allen: Excuse me, your Honor.

[54] (a pause)

The Court: Is there a question pending?

Mr. Allen: I don't believe so.

(Last question read)

Mr. Allen: I am sorry.

The Court: If he knows, he may answer.

A. Over our objections.

The Court: Over "our" objections?

The Witness: Yes, your Honor.

XQ. Now I want to clear something up for the Court.

The Court: You say, "Over our objections." Whom do you mean, yourself personally?

The Witness: Mine and some of the plaintiffs' that originally —

The Court: Some of the plaintiffs'?

The Witness: Yes, your Honor.

XQ. Now, Mr. Palmigiano, I want to clear up one thing that might be confusing the Court here. Prior to November 11th you were classified in general population. Is that correct? A. Yes.

XQ. But you were classified to the maximum security building, were you not? A. Yes.

XQ. You were a maximum security prisoner. A. Yes.

[55] XQ. When you referred to South State, that is just a portion of the gray building where your cell is located. A. Yes.

XQ. And you have been a maximum security prisoner for how long? A. Three and a half years.

The Court: Since your commitment, you mean?

The Witness: Since my commitment.

Mr. Allen: I would ask the Court while I am asking the next question perhaps to — I invite the Court's attention to Section I on page 17 of Respondents' Exhibit A for identification.

XQ. Were you advised that statements you make in your defense in a disciplinary hearing were probably not admissible at a trial or were you told they might be admissible? A. I was told they may be admissible.

XQ. And you were told that you might wish to consult an attorney to determine what to do, weren't you? A. I was told to contact my attorney.

XQ. Right. So you are familiar with Section I, aren't you? A. No, I am not.

XQ. Now during the hearing before Captain Baxter Flint was there to represent you or assist you, wasn't he? A. No, he wasn't.

XQ. What was he there for then? A. He was there to record the proceedings.

The Court: Was that customary practice, that each such [56] proceeding would be recorded by Mr. Flint?

Mr. Allen: That is covered by the rules, your Honor.

The Witness: Well, by someone.

The Court: It was their duty to record your proceeding?

The Witness: Yes, your Honor.

XQ. Now when you went in there the first time, you elected to give no testimony yourself. Isn't that right? A. On advice of attorney, yes.

XQ. Did you request that any witnesses be called and interrogated on your behalf, as provided in the rules? A. I stated at the beginning that I — on advice of attorney I remained mute.

The Court: That isn't an answer to the question, is it? A. (Continued) No, I didn't call anybody.

XQ. You didn't request any witnesses to be called for your — A. Nope.

XQ. Did you know that you had that right? A. Yep.

The Court: What is that?

The Witness: Yes, sir.

Mr. Allen: Now one final thing I want to ask you about. My co-counsel has suggested that I note for the record that on page 18 of Respondents' Exhibit A, paragraph No. 10, at the bottom of the page reads substantially that an inmate may request that a recording be made of the hearing.

[57] XQ. Now, you know, I am a little puzzled. Maybe you can help me out, Mr. Palmigiano. You told this Court that you were locked up on the night of the — Saturday night, the 11th, and that was right after the incident with Luther Gorton. Right? A. Yes.

XQ. And you told this Court that you saw Allegra Munson on Sunday and Stephen Fortunato on Monday. Am I to understand you are telling the Court you didn't talk to anybody else during that time? A. I talked to Larry Schwartz.

XQ. How often did you see Larry Schwartz during that time? Maybe we had better for the Court — who is Larry Schwartz? A. Larry Schwartz is treasurer of the National Prison Reform Association at the ACI.

The Court: You talked to Larry Schwartz and he is treasurer of the National Prison Reform Association?

The Witness: Yes.

The Court: Is he an inmate out there too?

The Witness: No, he is not.

XQ. He is a social worker from the — A. Providence Corporation.

XQ. (Continued) — Providence Corporation, isn't he?

The Court: Social worker. How often did you talk to Larry?

A. During the time I was locked up or in general?

[58] XQ. Between November 11th, Saturday night, when you were locked up, till the time of the hearing, the 13th, Monday. A. I talked to him Sunday and I believe I talked to him Monday afternoon.

XQ. During the time you were locked up were you furnished a paper and pencil or paper and pen or typewriter and paper? A. I was in my cell. I had access to any and all materials I needed.

XQ. You have a full supply of stationery materials for your own purposes in your own cell? A. Yes, I do.

XQ. Does that explain why, when I was flying to Washington on Monday morning, I read a long press release issued by you?

Mr. Fortunato: Objection.

Mr. Allen: He is testifying he is locked up. Now I am trying to bring out how much he actually is locked up.

Mr. Fortunato: Your Honor, we are talking about the gravamen of the case before the Court, the BCU and how he got there, or November 11th to November 13th. Furthermore, the relevancy of what the press has — I think the Court indicated earlier this morning you are not particularly interested in what TV says. I am not so sure that the newspaper report is at all germane to the proceedings at bar.

Mr. Allen: I am not in the slightest interested in what he said to the paper. I am interested in bringing out the [59] extent to which he is a truth teller. He has testified to the Court he was locked up during this three-day period — 2 and ½-day period, and I am trying to bring out exactly to what extent he was locked up. I think if he has access to the Providence Journal — I suggest to the Court that his lockup isn't very severe.

The Court: Only a short while ago, Mr. Fortunato, you were doing your best to impress upon me that if this hearing could not be completed between now and Thanksgiving, this prisoner was suffering beyond all endurance by being denied substantially any and all privileges. I take it even though he is in this new section, he does have the right to visitors; he does have the right to send out letters.

Mr. Fortunato: This is where I am afraid the matter is becoming a little muddied. In the section he is in now, and the one he has been in from the time of his sentencing, I believe his testimony was no visitors other than attorneys. He can write out. What his privileges are coming in, I don't believe —

The Court: That is where he is presently locked up?

Mr. Fortunato: We can cover that on —

I think the objection is pending to the question on sometime between the 11th and the 13th — something about Mr. Allen flying to Washington and reading about things.

The Court: I will allow it. Let's have the question. [60] The Witness: The question was about the press release, your Honor.

A. The warden of the institution refused me permission to speak to the reporters. Bobby Flint gave the press release.

XQ. Do you deny that you prepared a press release? A. Yes, I do.

The Court: It was prepared by Flint, in other words?

The Witness: Yes, the warden refused me access to talk to the reporter.

XQ. You prepared no press release? A. No.

XQ. Did someone else prepare it under your direction and supervision? A. No.

XQ. Did someone prepare it at your direction? A. It was prepared with my consent, yes.

The Court: It was prepared with your consent?

The Witness: Yes.

The Court: At your request?

XQ. By whom? A. Bobby Flint.

XQ. Did you confer with him about it? A. No.

XQ. How did you give your consent? A. I was asked about a press release, and I says okay.

The Court: What is that?

[61] The Witness: I was asked if we — I wanted to give a press relase on the story.

The Court: Asked by whom?

The Witness: Robert Flint.

A. (Continued) And I says — I contacted the warden to find out if I could speak to the reporter, and the warden says he wouldn't allow me to talk to the reporter; he would allow Bobby Flint and Ronald Johnson.

XQ. Well, did you suggest or direct or in any way encourage Johnson or Flint to release the statement in your name? A. I don't know what you mean by if I encouraged them. They made the release with my consent but I wasn't there to prepare the release.

XQ. As I was flying in the plane and reading, the Journal said: "Palmigiano says; Palmigiano says." Did you in any way aid, abet, encourage, dream up, or permit the Providence Journal to say, "Palmigiano says"? A. No, I didn't prepare the press release.

XQ. Mr. Palmigiano, I am asking you: Did you tell Flint to release it in your name, to have it say, "Palmigiano says"? Yes or no?

Mr. Fortunato: Objection, your Honor. I ask such answer, if there was, be stricken, I think that is argumentative.

The Court: It is proper questioning.

A. He had my consent to make a press release. It is as simple as that.

[62] XQ. Did you tell Flint: "Use my name"? A. Yes.

XQ. Did you tell him what to say you were saying? A. No.

XQ. Did you give him any idea what to say you were saying? A. No.

XQ. Did you see the press release in print? A. Yes.

XQ. And it quoted you verbatim, didn't it, or purported to? A. I don't believe it did.

Mr. Allen: Your Honor, I am going to suspend cross-examination at this time. It is the lunch hour anyway. And I would like to see what this fellow really is up to here because my recollection of it — and it is only a week ago — my recollection is that press release was issued with quotation marks. And the Providence Journal is rather cautious about this matter. They don't put quotation marks in unless they have got good authority for it.

So I would ask leave to suspend cross-examination at this time.

The Court: Are there not any other matters you wanted to inquire into?

Mr. Allen: No, this was the last matter.

(A pause)

XQ. So we now have two areas in which Flint was involved with you: [63] In terms of this press release and in terms of making the recording in the hearing room. You requested Flint to make that recording? A. Yes, I did.

XQ. So you saw Flint sometime during the November 11th to 13th period when you were allegedly locked up. You saw him and conversed with him about making a tape recording. A. To clear up the situation for the Court, when I was confined to my cell on the 11th any and all inmates in the institution wishing to speak to me, could come up to my cell. I wasn't segregated at the time. So it is a situation if Bobby Flint or an other inmate in the

institution wanted to convey with me about any matter, they could come up to my cell.

XQ. And they did. A. And they did.

XQ. On how many occasions? A. They kept coming back and forth all day long.

XQ. All day long? A. Different inmates.

XQ. On Sunday? A. Sunday also, yes.

XQ. And on Monday? A. Yes, Monday.

XQ. So you were a pretty busy guy on Sunday and Monday, weren't you?

Mr. Fortunato: Objection.

[64] The Court: I will sustain the objection.

XQ. You discussed during that period of time the conduct of the hearing with Flint too, didn't you? A. No, I didn't.

XQ. You just told us you asked him to record it. A. Yes.

XQ. Did you mention the hearing in any other way to him? A. No, I had no idea what course I was going to take at that time.

XQ. Did you discuss it with him? A. No.

XQ. You asked him to record it? A. Yes.

XQ. Did you ask him to be present in the room? A. How else could he record it?

The Court: What is the answer?

The Witness: How else could he record it?

XQ. Who owns the recording machine? A. Mr. Larry Schwartz.

XQ. Did you say — when you saw Larry Schwartz, you asked him for the tape recorder? A. We have one of our own that is out on repair, and I asked Larry if he would bring his own in for us.

XQ. Did he agree to do that? A. Yes, he did.

The Court: This machine belonged to Schwartz?

[65] The Witness: Yes, your Honor.

The Court: You saw him on Sunday?

The Witness: Yes, your Honor.

XQ. Did he bring the recorder to you on Monday? A. He gave it to one of the superior officers.

XQ. And did he bring it to you? A. He didn't bring it to me; he gave it to one of the superior officers.

The Court: How do you know that?

The Witness: He told me.

XQ. How did you come into possession of the tape recorder? A. It was never in my possession.

XQ. Did you tell someone to give the tape recorder to Flint? A. The — we have permission under the rules to tape-record any disciplinary proceedings. We have our own recorder that is broke, and I asked Larry Schwartz if he would bring his own in, which he did. And he turned it over to one of the superior officers, and one of the officers in turn — which one I have no idea — turned it over to Bobby Flint.

XQ. And Flint used it at the hearing? A. Yes.

The Court: I take it this request of Schwartz was made on Sunday?

The Witness: Yes, it was.

The Court: This incident, this booking, occurred Saturday [66] night?

The Witness: Saturday night, your Honor.

The Court: Schwartz was in to see you on Sunday?

The Witness: Yes, your Honor.

Mr. Allen: Your Honor please, at this point I have nothing more to inquire about except the inconsistency that I mentioned a moment ago. And I would therefore ask to suspend cross-examination and ask for a continuance for the reasons urged earlier by my brother, Mr. Burke, until 10:00 a.m. tomorrow morning — unless my brother —

The Court: If Mr. Fortunato has some other testimony to present, I want to continue with this hearing. It is the

type of case that is entitled to a hearing, and let's have it.

Have you got other testimony to present this afternoon, Mr. Fortunato?

Mr. Fortunato: May I have a moment, please, your Honor?

(A pause)

Mr. Fortunato: Your Honor please, needless to say, I would like some redirect with Mr. Palmigiano. I wonder if we could resume at 2:00 o'clock, and in the interim perhaps Mr. Allen could get the press release, if that is what is causing the delay now.

The Court: Will you have further testimony at 2:00 o'clock?

Mr. Fortunato: I believe I will, your Honor.

[67] The Court: I would like to ask the witness one or two questions, in any event, if that doesn't interfere with Mr. Allen's program.

Was Flint there merely to record this hearing before the board?

The Witness: Yes, your Honor.

The Court: And he was there for no other purpose?

The Witness: No, your Honor.

The Court: You have testified, have you not, at the close of the hearing and the announcement of the board's decision you were then asked if you claimed an appeal?

The Witness: Yes, our Honor.

The Court: Did you not tell us that Flint at that time stood up and said he objected to the entire proceedings?

The Witness: Yes, he did, your Honor.

The Court: If he was there merely to record the proceedings, what was he doing objecting? Wasn't he acting as your representative?

The Witness: I think, your Honor, he was so upset with the proceedings and the sentence.

The Court: You think he was so upset?

The Witness: In my opinion, yes, your Honor. I think he was upset and it was like a spontaneous reaction on his part.

The Court: But he did arise and object strenuously to the proceedings.

[68] The Witness: Yes, he did, your Honor.

The Court: And criticized them adversely.

The Witness: Yes, your Honor.

The Court: We will stop here, gentlemen, until 2:00 o'clock. The witness is still under cross-examination.

Mr. Fortunato: So there won't be any misunderstanding, my plan at 2:00 o'clock is, hopefully, Mr. Allen will have the press release; and then I will probably be 25 or 30 minutes on redirect. I might have another short witness.

The Court: We won't put any time limitation on you. I just want to go as fast as we can. We will stop here then until 2:00 o'clock.

(Noon Recess)

AFTERNOON SESSION

2:00 P.M.

Mr. Allen: At this time I am prepared to go forward with the cross, your Honor.

The Court: Very well.

Mr. Allen: First of all, I want to apologize to the Court, and, I suppose, counsel. My memory of what I had read in a newspaper was in error. The article does refer to Mr. Palmigiano, but the person quoted at length is Mr. Flint, not Mr. Palmigiano.

The Court: Very well. The record will so indicate.

[69] XQ. (By Mr. Allen) Now, Mr. Palmigiano, let me ask you: You were in that hearing room at all times that Flint was, weren't you? A. Yes.

XQ. And were you situated in the hearing room in a place where you could hear — as far as you know — every word that Flint said? A. Yes.

XQ. Do you believe that you did hear every word that he said in that room? A. To the best of my recollection, yes, I would say I did.

XQ. And you didn't protest or object when — you, Mr. Palmigiano, did not protest or object when Flint said to the board that he was your advocate, did you?

Mr. Fortunato: Objection. He misstates the testimony.

Mr. Allen: I am prepared to play the tape at this time.

Mr. Fortunato: That seems to me improper procedure at this juncture of the proceedings.

Mr. Allen: He has testified this man was in the room for the sole purpose of running the tape recorder. I have heard the tape and I am going to ask him some questions about what is on that tape.

Mr. Fortunato: There has been testimony by Mr. Palmigiano that Mr. Flint played the tape —

The Court: Played the tape?

Mr. Fortunato: — used the tape recorder in order to record the proceedings.

[70] The Court: To record everything that was said.

Mr. Fortunato: After Mr. Palmigiano was informed of the findings of the board and the sentence of the board, Mr. Flint then objected strenuously to the board's proceedings and also claimed an appeal on behalf of Mr. Palmigiano. I believe counsel —

The Court: I don't know that he said that yet.

Mr. Fortunato: No. That Flint claimed an appeal. He did not say he was counsel for Palmigiano.

The Court: I don't know that he said that. He said Flint criticized very vigorously the findings and conclusion of the board. I didn't hear him say Flint claimed an appeal.

Mr. Fortunato: At no time has Mr. Palmigiano said Mr. Flint made a representation that Flint was there to be his advocate.

The Court: I think that is a proper field of inquiry for counsel for the defendants.

Mr. Fortunato: I think it is an area of inquiry but that the evidence was misstated when the question was put to Mr. Palmigiano.

Mr. Allen: Your Honor will recall your Honor yourself inquired as to this matter just before we went to lunch. And my recollection is — my trial notes say he answered your Honor's question that Flint was not his attorney. That is what the trial notes show his answer this morning to be.

[71] The Court: You may pursue it. Go ahead. Get back to the proper foundation for this line of questioning.

XQ. I will ask you again, Mr. Palmigiano: Was Flint in there as your attorney? A. No, he wasn't.

XQ. Did in fact he state to the board that he was your advocate? A. I don't recall the exact words he used at the time.

XQ. Do you want me to play back the tape?

The Court: You don't recall the exact words he used. Is that what you are telling us?

The Witness: Yes, your Honor.

XQ. If I represent to you that he stated to the board that he was your advocate, will you deny it?

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: If he is trying to impeach, I don't think this is proper procedure.

The Court: It is proper cross-examination. I will allow it. A. As far as I was concerned at that hearing, I remained mute.

The Court: That wasn't the question Mr. Allen asked you. Read the question.

(Last question read)

A. I don't recall exactly what he said.

The Court: You don't recall exactly what he said?

The Witness: What he said at the time.

[72] The Court: Do you recall substantially what he said?

The Witness: All I recall, your Honor, was him protesting to the entire proceedings. The exact language, terminology, that was used at the time, I don't recall.

XQ. Isn't it a fact, Mr. Palmigiano, that he spoke extensively all the way through the hearing from beginning to end? He probably said more than any other single person in the room. A. I don't know that to be a fact.

XQ. Would you deny it? A. I don't know it to be a fact.

XQ. You tell us. How much do you think — do you recall Flint saying in that room in the posture of acting on your behalf? How much? A. Well, I recall him —

The Court: You recall Flint.

A. (Continued) — giving the date; that this was an alleged disciplinary board hearing.

The Court: This was said during the hearing, wasn't it?

The Witness: Yes.

The Court: You recall what again?

The Witness: I recall him saying that this was, you know, a meeting of the disciplinary board. He named Captain Baxter as chairman, Officer Carney, Classification Officer Mitchell.

The Court: Mitchell?

[73] The Witness. Yes. I mean Siner.

The Court: Siner?

The Witness: Siner.

The Court: Mr. Flint named them as constituting the board?

The Witness: Yes, your Honor.

XQ. Then what did he say? A. I don't recall any further from there. I recall Captain Baxter reading the book, et cetera.

The Court: You recall what?

The Witness: Captain Baxter reading the alleged charge against me.

XQ. Let me refresh your recollection. Don't you recall Flint protesting very vigorously at Remillard being in the room? A. Yes, he did.

XQ. And that went on for several minutes, didn't it? A. Yes.

XQ. Till finally what happened? A. Remillard left.

XQ. At whose request? A. At Mr. Flint's.

XQ. Was he asking on his own behalf? Did he have any charges pending against him? A. No.

XQ. He was acting on whose behalf? A. He wasn't acting on my behalf.

[74] The Court: He wasn't?

The Witness: He wasn't there as my representative, so whatever Bobby Flint — or whatever actions he took at the time, he done without my approval. He was there at my request to record the proceedings, and whatever language or words that Bobby Flint used were his own.

The Court: Did you protest his making these remarks?

The Witness: I didn't say anything, your Honor. I just sat there.

XQ. You accepted the benefit of his assistance, didn't you?

Mr. Fortunato: Objection.

The Court: I will allow it.

Mr. Fortunato: Your Honor, could I — I think that is a conclusion for the Court as to the dubious benefit.

The Court: You made no objection to any remarks he made in your hearing —

The Witness: No.

The Court: — relating to yourself?

The Witness: No, your Honor.

Mr. Allen: At this time I would ask that a tape cassette be marked as Respondents' B, and I would offer it as a full exhibit.

The Court: What do you call it?

The Celrk: Tape cassette.

Mr. Fortunato: I object to it being marked as a full [75] exhibit or coming in at this time as a full exhibit.

The Court: It is certainly entitled to be marked as an exhibit for identification.

Mr. Fortunato: I meant exhibit for evidence.

Mr. Allen: Is counsel concerned about the authenticity or relevancy? I have to know how to meet the objection.

Mr. Fortunato: My objection at this time is that the best evidence that we have of the proceedings as to what went on in that room is statements by Mr. Palmigiano. A tape duly authenticated, so far as I am concerned, could be used either to refresh his recollection and possibly through another witness to contradict what he said at the hearing.

The Court: Have you seen the tape which is being offered?

Mr. Fortunato: I haven't heard it yet, your Honor.

The Court: Have you seen it?

Mr. Fortunato: I haven't even seen it.

The Court: It is a proposed exhibit.

Mr. Fortunato: It is apparently a cassette that fits into tape recording devices. It says: "Do you own thing! Cassette 60." And it says — there is some other writing on there that says "Palmigiano, this side."

The Court: I don't know who made the tape. There is nothing in the record to indicate what its source is.

Mr. Allen: Very well, your Honor.

[76] The Court: It may be marked B for identification subject to laying a proper foundation.

Admittedly Mr. Flint did make a tape recording of the proceedings before the board.

Mr. Fortunato: Yes, your Honor.

Mr. Allen: And counsel will not stipulate that B for identification is in fact the tape.

Mr. Fortunato: I would like to hear it before I stipulate to that. But even conceding that it is, I object to it coming in.

The Court: If we are going to get into a hassle over this, I suggest Mr. Flint be brought in under oath and testify as to who made the tape.

Mr. Allen: I contend Captain Baxter would be equally appropriate.

The Court: Captain Baxter. We aim to get at the facts, gentlemen.

(Tape cassette marked "Palmigiano, 11/13/72," marked Defendants' Exhibit B for identification)

XQ. Immediately prior to the time you informed the board you were going to stand mute, isn't it a fact that Mr. Fortunato was in the hearing room, Mr. Palmigiano? A. No.

The Witness: Would you rephrase that question? I don't have it quite clear.

[77] Mr. Allen: I will rephrase the question. Strike it.

XQ. Was Mr. Fortunato in that hearing room with you at any time? A. At any time?

XQ. Yes. A. Yes, he came in at the beginning and he was informed that he could not be present at this hearing.

XQ. And Miss Munson was in there too with you. A. Miss Munson was.

The Court: Miss Munson.

XQ. And Mr. Gonnella was in there with you. A. Yes.

XQ. And he is a lawyer. A. Yes, he was.

The Court: Mr. Gonnella?

Mr. Allen: Gonnella. G-o-n-n-e-l-l-a.

The Court: They were all in the hearing room at the outset. Is that it?

The Witness: Your Honor, they all came in at the beginning of the proceedings with Mr. Fortunato.

The Court: With you?

The Witness: Yes, your Honor.

Mr. Allen: That would be Ralph Gonnella, to whom the witness has previously adverted in his testimony, and it would be Allegra Munson of the Rhode Island Public Defender's office.

The Court: In other words, they were told they could not [78] remain in the hearing room. Is that it?

The Witness: Yes, your Honor.

Mr. Fortunato: Are you asking me, your Honor?

The Court: The witness says they were.

Mr. Allen: I have no knowledge one way or the other.

The Court: You are telling us the disciplinary board told Mr. Fortunato, Miss Munson, and Mr. Gonnella that they could not remain in the room.

The Witness: The exact words I recall at the disciplinary board was "We do not allow attorneys at these hearings."

Redirect Examination by Mr. Fortunato

Q. Mr. Palmigiano, the first time that you entered the hearing room — the first time — who accompanied you into that room? A. You did.

Q. Did anybody else? A. Robert Flint.

Q. The second time —

The Court: In other words, Mr. Fortunato, Flint, and you went in together.

The Witness: Yes, your Honor.

Q. The second time you entered the room —

The Court: How long did you stay in that room following your entry thereto?

The Witness: Approximately — no longer than two, three [79] minutes, your Honor.

The Court: Then you all came out?

The Witness: Yes, your Honor.

The Court: The three lawyers and yourself?

The Witness: No.

Mr. Fortunato: Your Honor, that is the thing. I want to find out when the other two lawyers got into that room.

The Court: I thought you all went in. Oh, the two lawyers.

Q. When did — if you recall, when did Mr. Ralph Gonnella and Miss Allegra Munson go into that room? A. The second time we entered.

The Court: The second time you entered?

The Witness: Yes, your Honor.

Q. Were they there as your attorneys at your request that day? A. No.

Q. Who was your attorney that day? A. Yourself, Mr. Fortunato.

The Court: Do you know what happened, how Miss Munson and Mr. Gonnella were in there?

The Witness: Yes, your Honor. Mr. Gonnella is a member of the NPRA board of directors, and Miss Munson is legal adviser also to the Association.

The Court: We now are at the point where — to keep the succession of events here: "Flint, Mr. Fortunato, and I [80] went in together; we were there no longer than two or three minutes. Then the next bit of testimony is "Mr. Gonnella and Miss Munson went in with us later." What "later" means, I don't know.

Mr. Fortunato: I will clear this up, your Honor.

Q. Now going back to your testimony earlier today, is it fair to say that when you and I left that room the first time —

The Court: Did Flint remain?

Q. Where did Flint go, if you know? A. Excuse me. I really don't know like where he went at that point.

The Court: Did he come out with you and Mr. Fortunato?

The Witness: I really don't recall, your Honor.

Q. Did you have a conversation with anybody outside in the hall? A. Yes, I did.

Q. With me? A. With you.

Q. That is the conversation you earlier testified to that Deputy Warden Remillard came up and talked about standing mute and it being held against you. A. Yes.

Q. After remaining in the hall — how long did we remain in the hall at that time? A. No more than five minutes.

Q. Then did we go back in the hearing room? A. Then we went back in the hearing room.

Q. That is the time you said also in that room — whether they [81] walked in in front of us, behind us — nonetheless, Miss Munson and Mr. Gonnella were there. A. Yes.

The Court: You don't know whether they went in ahead of you or after you?

Mr. Fortunato: They were there.

The Court: They must have been there ahead of you if they were there when you went in.

The Witness: To the best of my recollection, your Honor, I believe they walked in behind us.

Q. Then after remaining in the room — how long on that particular trip did we remain in the room? A. Well, I believe at that time that you made some remarks pertaining to the disciplinary board, and we asked — you asked that if you could have another few minutes with me in the corridor. I don't think we was in the room over a couple of minutes.

Q. And we then exited from the room. A. Yes.

Q. When I say, "we," that is you and I. And did Mr. Gonnella and Miss Munson also leave the room? A. Yes.

Q. Then did you have another occasion to go back inside that room? A. Yes, I did.

Q. And that was to go back to the hearing. [82] A. That was to go back to the hearing.

Q. At that time neither I, nor Miss Munson, nor Mr. Gonnella went back in with you. A. Correct.

Q. Mr. Flint was in there, however, with his tape recording device. A. Yes.

Q. That is when you had the conversation with Captain Baxter. I say, "conversation." He read the charges to you. A. Yes.

Q. You said you chose to remain silent. A. Yes.

Q. At any time while you were in this hearing room did Mr. Flint give you legal advice or strategic advice as to how to present your case or what to do? A. No.

Q. Now Mr. Flint was in there at your request to operate a tape recording device. A. Yes.

Q. Did you observe him doing this? A. Yes.

Q. And would you observe him talking into it himself from time to time to explain the persons present or the trouble he might have been having with the tape recorder — things of that nature? A. Yes.

Q. After the charges were read to you, you were having your [83] conversation with Mr. Baxter regarding the charges, and you said you were going to be silent and then you were told to leave the room. A. Yes.

Q. Did Mr. Baxter at any time ask you if you wanted to have anybody there to speak in your behalf as a witness or anything of that nature? A. No.

Q. What section of the prison is the Behavior Correctional Unit in? A. It is the far south, I believe.

The Court: It is what?

The Witness: Far north. It is the last block, last wing in that building.

Q. That is your best information? A. Yes.

Q. Anyway, it is not in the general population area? A. No.

Q. And it is not in the South State Wing where you previously had your cell? A. No.

Q. Now you recall when Mr. Allen was asking you questions about the time between November 11th and the hearing? You recall that? A. Yes.

Q. Between November 11th and the hearing —

[84] The Court: November 11th and November 13th.

Mr. Fortunato: No, between November 11th, your Honor, to the date of the charge that was made and the hearing on November 13th.

The Court: That is what I say: between November 11th and November 13th.

Mr. Fortunato: Right.

Q. Between November 11th and the 13th you were kept generally locked in your cell in South State Wing? A. Yes.

Q. At the prison during the day, prior to people being locked into their cells at night, can prisoners in the general population walk around and go around near other people's cells and that type of thing? A. Yes.

Q. It was under those rules and practices that other inmates could come to your cell? A. Yes.

Q. But you were locked in your cell during the daytime hours? A. Yes.

Q. Unless an attorney or somebody else—I think you mentioned Mr. Schwartz—came to visit. A. Yes.

Q. But now since November 14th you are in the correctional unit? A. Yes.

[85] Q. That is also known as the hole. A. Yes.

Q. Or punitive segregation. A. Yes.

Q. Do other prisoners walk around back there? A. No.

Q. So no other prisoners can come to see you in your cell back there? A. No.

Q. What visitors are you allowed to see back there? A. The only visitors I am allowed to see is attorneys.

Q. Where do you take your meals? A. In my cell.

Q. When you were in the general population before the 11th, before this charge even was brought, where did you take your meals? A. In the mess hall.

Q. And other people would be present there? A. Other inmates, yes.

Q. Other inmates. During the course of the day, while you were in the general population, you had prison duties to perform? A. Yes.

Q. This is before November 11th. A. Well, I was basically working full time on—with NPRA.

Q. Was that with the warden's permission?

The Court: You were working full time for the National Prison Reform Association?

[86] The Witness: Yes, your Honor.

The Court: You weren't doing any other kind of work?

The Witness: I was still cutting hair in between.

The Court: That was very seldom. Is that it?

The Witness: Probably once a day, your Honor.

The Court: Once a day.

Q. You still had your barber shop, but you were mostly with the NPRA? A. Yes.

The Court: You mean maybe you cut one person's hair a day?

The Witness: Yes, your Honor.

Q. Does the NPRA have an office at the prison? A. Yes.

Q. Would you work in that office? A. Yes.

Q. And if you wanted to discuss prison reform matters with another inmate, he could either come up there or you might see him in the mess hall or some other arrangement could be made to see him? A. Yes.

Q. Because neither of you would be confined to the cells during the day. A. No, various inmates—

The Court: You weren't confined during the day if you were working for the—

[87] The Witness: No.

Q. Neither were other inmates in the general population? A. No.

Q. Now in your capacity—

Mr. Fortunato: Strike that.

Q. The National Prison Reform Association has brought some legal actions in this court, United States District Court, has it not? A. Yes, it has.

Q. Prior to that you have also sought relief in the Federal Court. Is that true? A. Yes.

Q. And some of these cases have gone to full written decisions by this court. A. Yes.

The Court: Not by this particular Judge.

Mr. Fortunato: Perhaps not by this Judge, your Honor, but by Judge Pettine.

Q. You have had several decisions from Judge Pettine? A. Yes.

Q. Is this one of the policies of the National Prison Reform Association: To ask to redress grievances by coming into the Federal Court?

Mr. Allen: I object.

The Court: Objection sustained.

Q. Now regarding the so-called rules that were promulgated under the [88] Morris Case—*Morris* v. *Travisono*—

The Court: Those are the regulations governing disciplinary classification procedures, et cetera?

Mr. Fortunato: I think that is Defendants' A for identification.

Q. (Continued) Did you tell any state attorneys involved in that case that you were dissatisfied with the rules that were to be submitted? A. Yes, we did. We—

The Court: "We." You were asked if you did.

The Witness: Myself; yes, I did.

A. (Continued) I requested that when negotiations was to take place, that I would be present before any negotiations would take place. And the attorneys said they would. And from my understanding, that the administration did not want us present.

The Court: Your understanding is what?

The Witness: That the administration at that time did not want us present.

The Court: That part of the answer is clearly hearsay. It may be stricken.

Q. Have you at any time told anybody that you waived any and all rights you might have to an attorney at any and all disciplinary hearings that might ever come up at the Adult Correctional Institutions? A. No.

[89] Q. Now you say that a charge was read to you.

The Court: This charge was read to him when?

Q. You said you had a charge read to you by Captain Baxter on that occasion when you entered the disciplinary hearing unaccompanied by anybody, and certainly not accompanied by any attorney. You said that is when the charge was read to you. A. Yes.

The Court: You went in with Flint, didn't you?

The Witness: Yes, your Honor.

The Court: It was read to you as you were accompanied by Mr. Flint?

The Witness: Yes.

Q. Now I am reading from the Plaintiff's Exhibit No. 1, full exhibit, in which it in effect says that you are charged —now I am quoting from the document:—

The Court: What does it say?

Q. (Continued) It says:

> "Inciting a disturbance and disrupt of ACI operations, which might have resulted in a riot. At 8:50 P.M., and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other

inmates and telling them not to go to the cells, when the buzzer sounds at 9:00 P.M.''

Was that what was read to you? A. Yes.

[90] Q. That statement that I just read? A. Yes.

Q. Was anything else read to you? A. Yes.

Q. Was anything that Captain Brule had filled out read to you? A. Yes.

Q. So far as you were told? A. Yes.

Q. And do you recall the substance of what was read to you and purported to be a report by Captain Brule? A. Well, not verbatim but—

The Court: What is that?

The Witness: Not verbatim, your Honor.

The Court: Is there such a document in existence? The best evidence of the contents would be the document itself.

Mr. Allen: It is before the Court as part of Exhibit 1.

Mr. Fortunato: That didn't go in. That was separated.

Mr. Allen: It was not my intention that it be separated.

Mr. Fortunato: This is signed by Brule. The other sheet was signed by Gorton.

Mr. Allen: When I produced that and agreed to it going in as a full exhibit, I was talking about an entire document, not just—

Mr. Fortunato: I am not sure they are all part of one document.

[91] Mr. Allen: I move to strike it.

The Court: You move to strike what?

Mr. Allen: Petitioner's Exhibit 1.

Mr. Fortunato: It seems to me the time to have noted your objection was earlier in the case.

Mr. Allen: They were stapled together. When I produced them, they were stapled together. This is the first time in this proceeding I have known somebody has torn one page from a four-page document offered.

The Court: Frankly, I don't recall what happened this morning. The document was offered to the Clerk and marked as a plaintiff's exhibit, was it not, Mr. Clerk?

The Clerk: Yes, one sheet.

Mr. Allen: Counsel tore it off without my knowledge. I did not observe any tearing apart.

Mr. Fortunato: There is no problem that—

Mr. Allen: Your Honor will observe that was all stapled together when I produced it this morning.

Mr. Fortunato: There is no question about that: That I took the top page off the stapled bit and I asked Mr. Gorton if he could identify this, et cetera. These other documents are signed by other people.

Mr. Allen: I didn't observe counsel selecting out a portion of the document for his—

The Court: Am I to understand that is the complete record [92] of what transpired before this disciplinary board?

Mr. Allen: Yes, that is the complete record except for this tape.

The Court: I don't know why it shouldn't be one exhibit.

Mr. Allen: That is the way I stated it to the Court. My brother agreed to it, and he asked it be marked as Exhibit 1, and then somehow it got separated. I ask it either be rejoined or—

Mr. Fortunato: Your Honor, this is not exactly my recollection of what happened.

Mr. Allen: I entered into an agreement the whole thing go in or not.

Mr. Fortunato: If I may have the Court's indulgence for two or three minutes to review it. I may not have any objection to it all coming in.

The Court: Go ahead and read it. It seems to me it is completely irrelevant whether it comes in as one exhibit or two or three.

Mr. Allen: My only point in the matter, your Honor, was that I thought to save myself some trouble to get all these documents in without calling a flock of witnesses to verify them. I have no particular enthusiasm for making a career out of this hearing.

(A pause)

Mr. Fortunato: Your Honor, I have no objection to this [93] coming in as a full exhibit, recognizing the Court's ability to separate the wheat from the chaff. But I do want to make it very clear that at no time was I clearly led to understand that this should come in as a full document at this time—this morning. What I did is: I had Mr. Gorton on the stand, and he authenticated what he knew about it. The next pages on this are purported to be signed by one Ronald Brule who is under subpoena. And it seems to me it would then have been proper—and I still want him here under subpoena—to put the documents in through him. That is my understanding of the way to proceed if in fact the witness is available.

There is another document which purports to be signed by one James Gould, a corrections officer, which talks about what he observed one Alfredo Pelleccia doing on the evening in question. And there is also a document attached hereto that—probably the one Mr. Gorton referred to earlier, where he wrote up a report regarding both Pelleccia and Mr. Palmigiano.

So in the interest of expediency I have no objection to these becoming part of Plaintiff's Exhibit No. 1, if that is the way the Court—and if counsel is straightened out now.

The Court: The Court has no specific opinion in regard to the matter. I will expect if they are made one exhibit, they will be properly authenticated during the testimony in this case; that is all.

[94] Mr. Fortunato: Yes, your Honor.

The Court: Are all the documents, which were or should be a part of Exhibit 1, incorporated in Exhibit 1?

The Clerk: Exhibit 1 will now consist of six sheets. Six sheets will be Exhibit 1.

The Court: That was your objective, Mr. Allen?

Mr. Allen: Yes, your Honor.

The Court: Is that what you wish?

Mr. Allen: That is what I wish, your Honor.

The Court: Very well; Exhibit 1, consisting of six sheets.

(Copies of additional reports in re Inmate Disciplinary Report of Nicholas Palmigiano added to Plaintiff's Exhibit No. 1)

Q. When you went back into the hearing room alone, Captain Baxter read you a charge. That was the one prepared by Gorton that I just read. A. Yes.

Q. Did he read you a document, or did he say something to you and then make an assertion that this was something furnished him by Ronald Brule? A. No, he read it in its entirety, the report by Mr. Gorton and the attached report by Mr. Brule.

Q. Had you ever seen the report by Brule before? A. Yes.

Q. At any time? [95] A. Yes.

The Court: When did you see it, on that date?

The Witness: On that day, your Honor.

The Court: In other words, you were permitted by Captain Baxter to examine it. Is that what you are telling me?

The Witness: Yes. Well no. Captain Baxter didn't make me examine it. This is in Robert Flint's possession.

The Court: Who gave it to Flint?

The Witness: One of the superior officers.

Q. So that before the hearing you did see the second page of Plaintiff's Exhibit No. 1? A. Yes.

The Court: It was in the possession of Flint.

Q. When you saw it, it was in the possession of Flint? A. Yes.

Q. And then was this read exactly to you at the hearing —the second page was? A. Yes.

Q. And then also the portion of the first page above Mr. Gorton's signature was read to you at the hearing by Captain Baxter? A. Yes, it was.

Q. But the—and you had seen both—neither of these two pages, as such, was given to you at the hearing. A. No.

Q. But you had seen them prior to that when Mr. Flint had them in [96] his possession. A. These—

Q. (Continued) I am talking about these two. (indicating) A. Yes, I did.

The Court: When did Flint actually show you the report of Captain Brule, in the hearing room before the disciplinary board?

The Witness: I think the first time I seen them was on Sunday when the attorneys came up.

The Court: You saw it the second time in the hearing room?

The Witness: I seen it—yes.

The Court: And you read it on both occasions?

The Witness: It was read to me on both occasions.

Q. Was it given to you to read while you were in the hearing room on November 13th? A. No.

The Court: Who read it to you?

The Witness: Captain Baxter.

The Court: A moment ago you said you read the statement of Brule and that it was in the possession of Flint.

The Witness: Before the hearing it was in the possession of Robert Flint.

The Court: Before the hearing.

The Witness: That is when I seen it. A copy of this [97] report was given to him.

The Court: The original was—

The Witness: The original was kept in the superior officer's. And when I went before the board, it was read to me.

Q. Looking at the third and fourth pages of Plaintiff's Exhibit No. 1 have you ever seen this document before? A. No.

Q. Never before? A. No.

The Court: Two pages constitute one document. Is that it?

Mr. Fortunato: Yes. The third and fourth pages are headed by the words, "State of Rhode Island, Inter-Departmental Communication," and there are some initials on there; and, also, the first name that appears beneath that is Roland Remillard, Deputy Warden; and below that, words that say "Maximum Security"; and below that, the words, "Capt. Ronald Brule"; and then some other words, and then the narrative. And then it is signed—what appears to be a signature of Ronald Brule. And the Court may wish this be re-Xeroxed because the second page is a little unclear.

Q. The fifth page is a document signed with the name on it, James R. Gould, and a signature purporting to be James Gould's. And have you ever seen this document before? A. No.

Q. And then the next document purports to be signed by Luther Gorton [98] and talks about also an inmate, James Madden, who appeared to him to be sick. Have you ever seen that document before? A. No.

Q. And was this last document read to you at the hearing? A. This one here? (indicating)

Q. Yes. A. No.

Q. So the only documents that were read to you at the hearing are the first page of Plaintiff's Exhibit No. 1 and also the second page. A. Yes.

Q. And nothing else was read to you? A. No.

Q. And, as you testified earlier, no documents whatsoever connected with this case were ever given to you by a correctional officer. A. No.

Q. Whether it is a charge or finding of fact or reasons for their decision. A. No.

Q. No documents—

The Court: No documents were ever given to you?

The Witness: No, your Honor.

The Court: Did you ever receive copies from someone besides the board?

The Witness: No. I only seen a copy that was given to [99] Robert Flint.

The Court: Flint?

The Witness: Yes.

The Court: Flint in turn turned it over to you and let you look at it. Is that it?

The Witness: Yes, your Honor.

Q. And the only two copies you have ever seen through Flint are pages 1 and 2 of the Exhibit No. 1. Right? A. Yes.

The Court: Did you see a copy of the charge or charges before the hearing?

The Witness: No, your Honor.

Mr. Fortunato: Did you understand Judge Day's question?

The Witness: Did I see a copy—

Mr. Fortunato: —of the charges before going into the hearing room?

The Witness: Yes.

Q. That is what Flint had in his possession? A. That is what Flint had in his possession.

The Court: Flint had it.

Q. That is, all you ever got from Flint is a copy of the charge and a copy of Brule's two-paragraph—or whatever it is—statement that constitutes page 2 of Exhibit No. 1. A. Yes.

Q. Are you still connected with the prison Jaycees? [100] A. Yes.

Q. What is your capacity with them? A. President.

Q. You are still president of the prison Jaycees. Have you ever received any awards for your capacity as president of the prison Jaycees?

Mr. Allen: Object.

The Court: I don't see the materiality, frankly.

Mr. Fortunato: I have nothing further, your Honor.

Recross-examination by Mr. Allen

XQ. Mr. Palmigiano, let's go through it one more time. Somebody, as far as you know, gave a copy of a charge, the book, to Flint. Right? A. Right.

XQ. And Flint showed it to you on Sunday before the board. A. Right.

XQ. And he discussed it with you.

The Court: Before the board? The board meeting was Monday.

Mr. Allen: The Sunday before.

The Court: The day before.

Mr. Allen: The day before.

The Court: A copy was given to Flint and shown to the [101] witness on November 12th.

XQ. Did he discuss it with you? A. No.

XQ. Did you discuss it with Mr. Fortunato or Miss Munson?

Mr. Fortunato: Objection.

The Court: He may answer.

Mr. Allen: It calls only for a yes-or-no answer, your Honor.

A. I discussed it with Mr. Fortunato on Monday.

XQ. And Flint appeared at the hearing? A. Yes.

XQ. Flint appeared at the hearing through a system

which you, as president of the NPRA, had worked out. A. He appeared at the hearing to record it.

The Court: What is that?

The Witness: He appeared at the hearing to record it, yes.

XQ. And he stated at the hearing that he was your advocate. A. I don't know that to be a fact.

The Court: You don't know it? Do you deny it?

The Witness: He was there solely to record the events that took place at the hearing. Whatever comments was made was made, you know.

The Court: Do you deny that he made the representation to the board that he was there before the board as your advocate?

The Witness: Your Honor, I don't remember exactly what he [102] said. If he made any comments, you know, I don't recall what he said at the time.

XQ. Let me come back to it again this way. The arrangement or procedure or system, which you had devised and which was followed at the ACI, was that charges were forwarded to the president or some other officer of the NPRA? Right? A. If I may—

The Court: Proposed charges, you mean, or charges when made?

Mr. Allen: Charges when made were forwarded to the NPRA.

A. If I may answer this way here to your question—

The Court: If you can, answer that first.

A. (Continued) The system we set up was that if an inmate got booked, the booking slip would come to the NPRA.

The Court: What is that?

The Witness: The booking slip would go to the NPRA.

The Court: That is the charge?

The Witness: Yes.

A. (Continued) Now there are exceptions; that when there are possible criminal charges coming out of such an incident, that myself, as president, or any other member of the NPRA, are not capable to represent an inmate that may receive a possible criminal charge. On the ordinary booking offense NPRA represents the inmate if he so wishes.

XQ. And that is why Flint was there. [103] A. No, Flint was there at my request; that I wanted the proceedings recorded.

XQ. When you worked this out, whom did you deal with, Warden Howard? When you set up this system where these booking slips would go to you, as president of the NPRA, whom did you work that out with, Warden Howard, Remillard? A. With Mr. Travisono.

XQ. With Mr. Travisono personally? A. Yes.

XQ. Was anybody else in the room when you arranged this? A. Yes, the warden and the board members of NPRA.

The Court: In other words, it was provided that whenever a booking slip was issued, a copy of it would go to the NPRA?

The Witness: Right. And we in turn would go down and see the inmate; and if he wished to have a classification officer represent him we would forward the slip to Classification. If he wished the NPRA to represent him, we would carry it from there.

Mr. Allen: You may inquire.

Mr. Fortunato: I have no further questions, your Honor. One moment, please. (A pause) I have no further questions.

The Court: Very well. You may step down.

Mr. Fortunato: Your Honor, at this time I do not have any other witnesses to present and would therefore request that the matter be continued till 10:00 a.m. tomorrow morning. As I understand it, the other people subpoenaed—

namely; Warden Howard, [104] Captain Baxter, and Captain Brule—will be required to attend pursuant to the subpoenaes.

I would also ask that the habeas corpus regarding Mr. Palmigiano in this matter be continued in effect through tomorrow so he may come in and participate and assist me in the proceedings.

The Court: He is certainly entitled to that.

Mr. Burke: Since I have not seen the subpoena, I just want to make absolutely sure on the record the three under subpoena are Howard, Baxter, and Brule.

Mr. Fortunato: Baxter, Brule, and Howard. That is right.

The Court: Baxter—

Mr. Fortunato: Howard and Brule.

The Court: Those are the only three?

Mr. Fortunato: That is correct.

The Court: Siner is not under subpoena?

Mr. Fortunato: He is not under subpoena and neither is Carney, nor is Mr. Remillard.

The Court: Very well. We will stop here, gentlemen, with the view of resuming tomorrow morning as near to 10:00 o'clock as we can. I think I will be free. I have a commitment for 9:00 but I hope to ber eady.

Mr. Allen: Before we go, could I take—

The Court: Just a moment. I want to make it clear on the record the plaintiff is to be brought back here tomorrow morning [105] shortly before 10:00 o'clock under the habeas corpus.

Mr. Fortunato: May I have five minutes with him now before he is taken back?

Mr. Allen: I would like to move at this time that Respondents' A be made a full exhibit. And I invite the Court, if the Court so desires, to listen to this tape during

the afternoon. We would leave a player with the Court if the Court wishes to listen to it.

The Court: I thought there was some little difference of opinion as to the reliability of the tape recording. I don't want to be listening to something I shouldn't listen to. If you gentlemen can or can't agree that is a true and accurate tape—

Mr. Burke: Might I make at least one suggestion? That is that Mr. Fortunato indicated he wanted to hear the tape. I think it might save time if he is allowed to listen to the tape this afternoon in the absence of the Court so when we proceed tomorrow it will not be a case of hearing the tape twice, once here, and then, if there is no objection, by the Court.

The Court: What is the purpose of playing the tape?

Mr. Burke: For the Court to hear it—eventually for the Court to hear it. But, as I understand Mr. Fortunato, he wanted to hear the tape prior to a ruling on its admissibility by the Court. And I thought there might be a conference this [106] afternoon in the absence of the Court.

The Court: I think that might save time all around.

The Clerk: A will be allowed as a full exhibit?

Mr. Fortunato: I have no objection to it.

(Defendants' Exhibit A for identification marked in evidence)

The Court: We will expect to resume as near to 10:00 o'clock tomorrow morning as we possibly can.

Mr. Allen: Thank you, your Honor. I will withdraw Exhibit B for identification for about a half an hour.

The Court: That is the tape. Return it to the Clerk when you have finished with it.

Mr. Allen: Yes.

(Adjourned at 3:00 p.m. until Wednesday, November 22, 1972, at 10:00 a.m.)

SECOND DAY

WEDNESDAY, NOVEMBER 22, 1972

10:07 A.M.

[107] The Court: Mr. Allen?

Mr. Allen: Your Honor please, I have not heard from Mr. Burke this morning but I assume we could proceed without him because he is probably involved in certain negotiations and unable to assist me in the trial of the case. I can proceed without him.

The Court: Very well.

Mr. Fortunato: Mr. Brule.

RONALD R. BRULE, Sworn

Direct Examination by Mr. Fortunato

Q. Mr. Brule, how are you employed? A. I am a correctional officer captain at the ACI.

The Court: A little louder, please?

The Witness: Correctional officer captain, ACI.

Q. You are a captain at the ACI? A. Yes, sir.

Q. This is the Adult Correctional Institutions? A. Yes, sir.

Q. On November 11th, 1972 were you employed by the ACI? A. Yes.

Q. And were you in fact on duty that day? [108] A. Yes, I was.

Q. What were the hours of your duty that day? A. 4:00 to 12:00.

The Court: 4:00 to 12:00. 4:00 p.m. till midnight?

The Witness: Right.

Q. What were your specific duties? A. Well, I am directly in charge of the 4:00 to 12:00 shift, maximum security.

The Court: I can't hear you, sir. A little louder.

The Witness: I am directly in charge of the 4:00 to 12:00 shift, maximum security.

The Court: In charge of the maximum security.

Q. Do you know a correctional officer named Luther Gorton? A. Yes, I do.

Q. Was he under your supervision that night? A. Yes, he was.

Q. Would it be fair to say that he was the guard generally in charge of South State Wing? A. Yes, he was.

The Court: In charge of the South State Wing. Is that it?

The Witness: Right.

Q. He would be behind a locked door in that wing. Is that it? A. Yes, he was. This was from where the superior officer's office is. There is a locked door.

Q. In other words, there is a locked door between where you remain [109] in your superior office and where Mr. Gorton maintains his duty post. A. Right.

Q. Did there come a time when Mr. Gorton gave you—

Mr. Fortunato: Strike that.

Q. Do you know who Nicholas Palmigiano is? A. Yes, I do.

Q. If he the gentleman seated at the counsel table, right counsel table, facing the Court? A. Yes, sir.

The Court: The answer is yes?

The Witness: Yes.

Q. Did there come a time on the evening of November 11th when Mr. Gorton submitted a report to you regarding an incident he allegedly observed involving Mr. Palmigiano? A. Yes, he did.

Q. About what time did he give you this report? A. Well, he informed me that he was going to book—

The Court: He informed you that he was going to be booked?

A. (Continued) He was going to write out the disciplinary report on Inmate Palmigiano approximately 9:30. Now he wrote it out and I probably received it around 10:00 o'clock.

Q. I show you the first page of Plaintiff's full Exhibit No. 1 and direct your attention to the typewriting on that page that appears above a signature which says: "L. Gorton." From the [110] signature up is that what he gave you? A. Yes, it is.

Q. Now you are familiar with the rules governing disciplinary procedures at the Adult Correctional Institutions? A. Yes, I am.

Q. I show you Defendants' Exhibit A—

The Court: These are the rules that were adopted in connection with the litigation entitled—

Mr. Fortunato: —*Morris* v. *Travisono*, your Honor.

The Court: And that case was decided when?

Mr. Fortunato: That is 310 F. Supp.. I think, your Honor, it was decided in 1971.

Mr. Allen: The final judgment in that case was either entered very, very recently or is still pending. The situation is this, your Honor: A hearing was held on preliminary injunction before Judge Pettine. And the opinion, to which my brother adverts in the Federal Supplement Reports, is Judge Pettine's opinion on preliminary injunction. Thereafter—

Mr. Fortunato: These rules were filed in September of this year, if that is what you are getting to.

Mr. Allen: Yes, they were filed with this court in September of this year.

The Court: Filed in September 1972?

Mr. Allen: Yes, your Honor. There was a first draft under which the parties operated for about a year. This is the [111] so-called final draft, which was filed in September of '72, and the District Court required that the State adopt these rules under Chapter 42-35—

The Court: Chapter 42-35?

Mr. Allen: —of the General Laws.

The Court: Chapter 42, Section 35.

Mr. Allen: No; Title 42, Chapter 35.

The Court: I see.

Mr. Allen: 42, Chapter 35, entitled "The Rhode Island Administrative Procedures Act," and that act requires certain—when an agency of the State is adopting rules, it requires, in and of itself,—the act requires certain notice to be given, opportunity for hearing to be had, and a reconciliation of the notice and the hearing be drawn up by the chief of the agency—in this case the Director of Corrections—which has been done. All these things have been done. And then the rules are filed. The final step is to file the rules with the Secretary of State, which has been done.

And this was all done pursuant to an order of the District Court that we follow the state law in adopting these rules. This has taken some weeks to go through these procedures in adoption of rules, which are not unlike the procedures followed by the United States under 5 U.S. Code.

These rules have now finally been adopted, and it was the purpose of the District Court Chief Judge to enter a [112] judgment of dismissal in *Morris* v. *Travisono* because these rules have become effective state law by virtue of Title 42, Chapter 35. By their adoption under Title 42, Chapter 35 they would then have the force of state law, and the Morris case would be dismissed.

I don't know whether an order of dismissal has been filed by the Chief Judge or not, but all steps leading up to it have been accomplished.

Does your Honor follow me?

The Court: I think I do. But when do you say these rules became effective? Is there anything in the record to indicate when they took effect?

Mr. Allen: I would need Mr. Burke for that, your Honor. He was in charge of carrying out those duties. I think they were filed with the Secretary of State in the order of one month ago, perhaps the third week in October. In any event they were effective on all dates germane to this proceeding, and prior to their filing with the Secretary of State they had the force of law by virtue of the District Court's opinion and judgment by the District Court who wished these rules to have the force of state law rather than the force of federal law—if your Honor follows me.

The Court: I do.

Mr. Allen: The District Court Chief Judge ordered these to be adopted as state law under our Administrative Procedures [113] Act. Once these rules have been adopted following state procedures they have, by virtue of this General Assembly's delegation,—once adopted properly, they have the force of state law as if they were general laws of this state.

The Chief Judge, as I understand it, conceived state management of this case; that once they had the force of state law, there was no further need for the Federal Court to enforce state law; and that the Federal Court—the District Court would then enter a judgment of dismissal, disposing of *Morris* v. *Travisono*.

Mr. Fortunato: I am somewhat unfamiliar with the various proceedings, negotiations, and whatnot, that took place regarding the rules themselves. I am advised by the Clerk's office, however, that in fact these rules were filed pursuant to *Morris* v. *Travisono* in September of this year; *Morris* v. *Travisono* being the same case at 310 F. Supp. that I referred to earlier.

I don't know what the purpose of the Chief Judge is and I don't know how he or counsel involved in any case in this court can in fact serve as legislators of state law.

I think this Court can rule as to what does or what does not comport with federal constitutional standards, and perhaps they can help the Court—sometimes can help in difficult cases for the State and people who have grievances to come up with decent and fair procedures. But I [114] don't know if fiat by this court can pass state law, if I understood Mr. Allen's argument.

The Court: It sounds a little unusual, I confess. But does the State concede that these rules became effective in October of 1972?

Mr. Allen: Yes, your Honor.

The Court: No specific date but just—

Mr. Allen: I can't give you the date. If Mr. Burke were here, he could because he in fact carried through the steps.

The Court: You anticipate he will be here sometime during the day?

Mr. Allen: I anticipate he will.

The Court: Very well. We will proceed on the assumption the rules were certainly in effect prior to November 11th.

Mr. Allen: I think counsel can so stipulate.

Mr. Fortunato: That is my understanding at this time, your Honor.

The Court: Very well. I don't think we need concern ourselves any longer with that.

Q. You identify Defendants' Exhibit A as being the regulations, as far as you are concerned, which are now in effect and were in effect as of November 11th at the ACI regarding disciplinary procedures? A. Yes, I do.

Q. Directing your attention to page 16—

[115] The Court: Page 16?

Mr. Fortunato: Yes.

Q. (Continued)—of Defendants' Exhibit A and then to II of Defendants' Exhibit A and then to II—

The Court: Just a minute. 16, II: "Investigation by a Superior Officer"?

Mr. Fortunato: Yes, your Honor.

Q. (Continued) And sections C and D thereunder, is it fair to say that these two parts of the regulations require you to investigate a disciplinary infraction that is called to your attention by one of the men working under you? A. Yes, it is.

The Court: C and D—

Mr. Fortunato: C and D, yes.

The Court: —require investigation by the witness. Right?

Mr. Fortunato: Yes.

Q. And you are to make an investigation, to talk to the officer who tells you about the infraction. You are to talk to him under these rules. A. Yes.

Q. And talk to the inmate involved who is accused of the infraction? A. Yes.

Q. And you are also to check with any other employees or inmates—to use the word here—"indicated"? [116] A. Yes.

Q. And then you are to make a written summary of your investigation? A. Yes, I am.

Q. And submit this report to the deputy warden. A. Yes.

Q. And then you are to give a copy of the disciplinary report—it says:

> "A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

Now are you to give that to the inmate or is somebody else supposed to do that, if you know?

Mr. Allen: Objection.

The Court: What is the objection?

Mr. Allen: This point is estopped because this plaintiff has admitted on the stand he negotiated with the witness

here under subpoena a different procedure, which this witness in fact has testified was followed.

The Court: What do you mean by that?

Mr. Allen: Your Honor please,—

The Court: These rules were adopted and became effective prior to November 11th, 1972.

Mr. Allen: Yes, your Honor. If Inmate Smith were to come before this Court and say the rules were not followed; I was not given a copy of the charge, then an issue would be raised. [147] I will not concede that that issue rises to the dignity of a civil rights infraction. But that is a matter of argument at some other time in some other case.

This plaintiff—this plaintiff here has told this Court that he negotiated—has told this Court yesterday afternoon, after extensive cross-examination, that he made an agreement with Mr. Travisono.

The Court: A little slower. Made an agreement with Travisono?

Mr. Allen: And with the warden.

The Court: Warden Howard?

Mr. Allen: And I will make an offer of proof the warden will so testify that he negotiated a different procedure other than that called for by the rules. Rather than a copy of the charge being given to the inmate charged, the copy, by virtue of the agreement negotiated by this plaintiff, was to be given to the plaintiff or Mr. Flint—one of these two people. In other words, there was a negotiated deviation from the rules. And this plaintiff cannot now be heard to complain because that deviation was followed in his own disciplinary case.

Mr. Fortunato: Your Honor, I don't think we have gotten into any complaint of not complying with nuances of the rules on this. I am simply asking this witness what he does or doesn't do so we can have some background. [118] The Court: You mean the customary practice?

Mr. Fortunato: Yes, I am asking him the customary practice and what he did here.

Q. It says:

> "A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

We are referring to the disciplinary report that you make out. A. Yes.

Q. Now do you give that to the inmate or does somebody else give that to the inmate? A. Someone else gives it to the inmate.

Q. Who gives it to the inmate? A. In this case Inmate Robert Flint was supposed to give this copy to the inmate.

Q. Whom did you give your copy to? A. Captain Miller.

The Court: Excuse me a minute. He has testified Inmate Robert Flint was to give a copy of the disciplinary complaint.

Mr. Fortunato: Yes; to Mr. Palmigiano.

The Court: That was a departure from this rule, wasn't it?

The Witness: This was the order we had received that had supposedly been negotiated.

[119] The Court: This was what?

The Witness: This was an order we received from the warden and Mr. Travisono that the rules here were to be changed slightly.

Q. Who gave you the order? Did it come in the form of a written order? A. Yes.

Mr. Allen: I renew my objection, your Honor.

The Court: If there was a waiver of the technical procedures required in the rules, I think it is binding both upon the plaintiff and upon the defendants. Why isn't it? If the plaintiff chose to waive that requirement in the rules and Mr. Travisono and Mr. Howard consented to that waiver, and it would change the procedures, I think that

change of procedures is binding on all parties concerned here.

Mr. Allen: I would say no exception to the Court's logic.

Q. In this particular instance regarding Mr. Palmigiano you made out a disciplinary report pursuant to those sections that I have just referred to on page 16. A. Yes, I did.

Q. And at what time did you make your report out? A. I can't remember the exact time. It was before midnight.

The Court: When you made it out, what did you do with it again, sir?

[120] The Witness: I stapled a copy to the inmate's copy, and I addressed it to—

The Court: What is that again? You stapled—

The Witness: I made out three copies.

The Court: Three copies of your report?

The Witness: Right. One copy was to the deputy warden; two copies—one—two copies went to the deputy warden, until after the disciplinary board. The third copy I addressed to Inmate Nicholas Palmigiano and I gave it to Captain Miller who in turn hand-passed it to Inmate Flint.

The Court: You say you addressed it to Palmigiano and gave it to Captain Miller?

The Witness: Captain Miller; right.

The Court: That was your end of it?

The Witness: Yes, it was.

The Court: What was done with the report after that is purely hearsay insofar as you are concerned. Is that it?

The Witness: Yes, it is.

Q. Now I show you the second page of Plaintiff's full Exhibit No. 1. Is this the report that you made out? A. Yes, it is.

Q. And this is the disciplinary report? A. Yes, this is my investigation.

Q. This is the result of your investigation? A. Right. [121] Q. And I show you pages 3 and 4 of Plaintiff's Exhibit No. 1 and ask you if this is a letter or document prepared by you at sometime. A. Yes, it is.

Q. Without going into the details, what generally is this letter that you say you prepared, pages 3 and 4? A. This is a report of the incident that happened this night.

The Court: It is a report—

The Witness: It is a report to the deputy warden of the incident that happened November 11th.

The Court: —to to the deputy warden of the incident of November 11th. Is that it?

The Witness: Yes.

Q. Did you make a copy of that for Mr. Palmigiano? A. No, I did not.

Q. So the only thing you furnished Mr. Palmigiano was page 2 of the report. A. Right.

Q. And at what time did you prepare the letter that you say goes to the deputy warden, pages 3 and 4 of the exhibit? A. This was before midnight.

The Court: Beg your pardon?

The Witness: Before midnight on that night.

The Court: Same night?

The Witness: Right.

[122] The Court: That would be on November 11th before midnight. Correct?

The Witness: Yes.

Q. Now directing your attention to page 2 again, that is your full investigation report, is it? A. Yes, it is.

Q. And the last line on there—

The Court: You are referring now to page 2?

Mr. Fortunato: Page 2.

Q. (Continued) — states:

"He definitely appears to be a threat to the security and order of the Institution."

Without going into details, was that based upon what Mr. Gorton told you about the incidents of November 11th or was it based on any other information you had in your possession?

Mr. Allen: Object.

The Court: What is your objection?

Mr. Allen: It is outside the scope of the inquiry of this case.

The Court: I don't quite follow you.

Mr. Allen: This complaint challenges the procedural due process afforded the plaintiff at the hearing. It does not challenge the procedural due process of the investigation. There is no Fourth Amendment claim here. There is no search and seizure problem. I fail to see why we have to get off the [123] track into the background of the investigation of the alleged misconduct of the plaintiff.

Mr. Fortunato: The question before this Court, and one raised in the complaint, is the question of merely having charges read to a man and then having him found guilty, no evidence being produced.

I want to authenticate these documents and I will offer now to tie this line of questioning in with other witnesses.

The Court: Certainly the rules that were approved by Chief Judge Pettine, with apparently the consent of counsel, specified certain procedures with respect to disciplinary situations. I think reasonable latitude should be permitted to determine whether or not there has been a substantial compliance with those procedures.

Mr. Fortunato: May I have the question read, please?

(Last question read)

A. This is based on what Mr. Gorton informed me of and my personal knowledge of the situation.

Q. Of the situation of November— A. November 11th.

The Court: Based on Gorton's report and what?

The Witness: My own knowledge of the incident of that evening.

The Court: Your own knowledge?

The Witness: Yes.

[124] Q. Now in preparing the—

Mr. Fortunato: Strike that.

Q. You prepared your investigation report—page 2, in other words—after Gorton tells you that he is going to charge Palmigiano according to what he set out in his report on page 1? A. I made my report after I talked to Inmate Palmigiano.

Q. Yes, but you began your investigation of the incident after Gorton reported to you. Is that correct? A. Yes.

Q. Had Gorton given his charging sheet to you at that time when you started your investigation? A. Yes, he did.

Q. So you had seen page 1 before you began your investigation. A. Yes, I had.

Mr. Fortunato: Page 1 of Plaintiff's Exhibit 1.

The Court: In other words, after you received Gorton's report you began your investigation, including an interview or discussion with the plaintiff. Is that it?

The Witness: Yes, sir.

Q. In preparing your investigation report you talked at some point to Mr. Palmigiano? A. Yes, I did.

Q. You had also talked to Mr. Gorton? A. Yes.

Q. Did you talk to anybody else? [125] A. Not concerning Mr. Palmigiano.

The Court: What is that, please?

The Witness: Not concerning Palmigiano.

Q. In other words, your disciplinary report—page 2 again—investigation report, is based solely on your contact with Mr. Gorton and Mr. Palmigiano. A. And my personal knowledge of the incident that evening.

The Court: And your personal knowledge of the incident?

The Witness: Yes.

Q. And for the purposes of your investigation report then that copy, that you prepared and gave to Mr. Palmigiano, and the other two copies going to the deputy warden—this constitutes a full statement of the significant facts that you had in your possession. A. Yes.

Q. Now at what time did you see Mr. Palmigiano? A. I don't remember exactly. It was around 11:00. 11:00 o'clock, I would imagine.

The Court: Around 11:00?

The Witness: Around 11:00. I don't know exactly what time it was.

Q. This, of course, was in the course of your investigation. A. Yes.

Q. And where was Mr. Palmigiano at this time? A. He was in his cell.

[126] Q. Locked in? A. Yes.

Q. Did you read the charge to him? A. Yes, I did.

Q. Did you have any further conversation with him at that time? A. I asked him what he had to say on the matter.

Q. As a result of that conversation, that you say you had, you prepared your investigation report? A. Yes; right.

Mr. Fortunato: Page 2 of the exhibit.

Q. Now directing your attention to November 13th, 1972, did you appear at any disciplinary hearing at which the charges were pressed against Mr. Palmigiano? A. No, I did not.

Q. Have you appeared at any disciplinary hearing at which the charges were pressed against Mr. Palmigiano? A. No.

Q. And you say that this letter, that constitutes pages 3 and 4 of Plaintiff's Exhibit No. 1, was given to Deputy Warden Remillard? A. Yes, it was.

Q. Did you give it to him personally? A. I sent it in the mail.

The Court: What is that, please?

The Witness: I addressed it to him and left it in the central office for him to pick up the next day.

[127] Q. That is the inter-prison mail? A. Yes.

Q. What is that called, that report? A. What is it called?

Q. Yes. A. What do you mean by that?

Q. Well, we called the other one—we have been calling the other report, that you prepared and gave to Mr. Palmigiano, your investigation report or your disciplinary report. What is this document called?

The Court: It doesn't bear any title?

The Witness: No.

A. It is a report to the deputy warden on the incident that happened that evening.

The Court: It is a report apparently. I don't know what else we could term it, regardless of any title.

Q. Well, the rules provide, do they not, at II D on page 16 that a copy of the disciplinary report, filed by the superior officer, should be given to the inmate prior to any hearing? So we are agreed that page 2 is called a disciplinary report, are we not? Can we agree on that? A. No, page 1 was the disciplinary report.

Q. Page 1 is the disciplinary report? A. Yes. According to Pettine's rules, page 2 is not supposed to go to the inmate.

[128] The Court: What is that, please?

The Witness: According to the rules put in this document, page 2 is not to the inmate.

Q. What you are now saying is that page 1 of the full exhibit is the disciplinary report. A. This is what is supposed to go to the inmate, just this top half.

Q. Which merely tells him what he is accused of? A. Yes.

The Court: What is the practice: To delete the remainder of that page 1, as it appears on the exhibit?

The Witness: In this case both pages went to the inmate.

The Court: Page 1 and what?

The Witness: And page 2.

The Court: Both went?

Mr. Fortunato: Yes.

The Witness: In the document the top and bottom half go to the classification counselor, and he discusses it with the inmate.

Q. Let's back up a little bit. II D says:

> "The superior officer shall make a written summary of his investigation including the results of his interviews and a notation of notice to the inmate. He shall sign and submit the full report to the Deputy Warden of the facility in which the infraction occurs. A copy [129] of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing . . ."

Did you make out page 1 that I show you here? A. No, I made out page 2.

Q. Gorton made out page 1?

The Court: One portion.

Mr. Fortunato: Yes. He made out everything above his signature.

Q. So you are saying that page 2, which starts with the words, "Superior's investigation," does not constitute a disciplinary report, as defined by II D of the regulations. A. Well, it hadn't been. It has been going to the inmates recently.

The Court: This is just a preliminary report before there has been any disciplinary action, isn't it?

The Witness: Yes, it is.

Q. When you went to Mr. Palmigiano's cell sometime around 11:00— A. Yes.

Q. (Continued)—in the evening of November 11th, it was you who told him he may be prosecuted for a violation of state law? A. Yes, I did.

The Court: You told Palmigiano that he could possibly be prosecuted for violating state law?

The Witness: Yes, I did.

[130] Q. And you had in mind incitement to riot, something of that nature? A. I didn't know what law it would be. This was not my determination. In case—it was my duty to inform him he may be prosecuted.

Q. Who had told you he might be prosecuted? A. No one had told me at the time, but seeing as how I was making the report it was my duty to inform him that he may or may not be.

The Court: He may or may not be what?

The Witness: Prosecuted.

Q. You also told him to get his lawyer because of the possibility of criminal prosecution? A. Yes, I did.

Q. Now in order to bring the disciplinary board people up to date prior to the hearing on November 13th, did you have any conversations regarding this incident with Captain Baxter? A. No, I did not. Captain Baxter was off the day after.

Q. How about Officers Siner or Carney? A. No, I did not.

Q. Did you discuss the incident with Mr. Remillard? A. Yes, I did.

Q. When did you talk to him about it? A. I talked to him that evening, the evening of the 11th.

Q. He was also on duty that evening? A. No, I called him at home.

Q. Did you charge another inmate named Alfredo Pelleccia also this [131] evening? A. Yes, I did.

The Court: Is that Pelleccia?

Mr. Fortunato: Pellecia, yes.

The Court: How do you spell it?

Mr. Fortunato: I believe it is P-a-l-e-c-i-a, your Honor.

The Court: Did he charge him with what?

Q. Did you charge him with something arising out of the same incident? A. Yes.

Q. Did you investigate that case too? A. Yes, I did.

Q. Did you also determine he was a threat to the security of the institution? A. Yes, I did.

Q. Just one or two things to clear up, Mr. Brule. The report to Deputy Remillard—

The Court: That is part of Exhibit 1, is it?

Mr. Fortunato: Yes, it is the 3rd and 4th pages, your Honor, of Exhibit 1.

The Court: Exhibit 1, pages 3 and 4.

Mr. Fortunato: Right.

The Court: That is the report.

Q. That is the report, written report, you made to Deputy Remillard? [132] A. Yes.

Q. And this is based generally on the incidents of November 11th, the evening of November 11th— A. Yes, it was.

Q. (Continued—involving a second man named Madden, this man, Pelleccia, and Mr. Palmigiano,—generally what you believe went on. A. Yes.

Q. This report was also prepared—when I say, "also," in addition to the shorter report which is entitled "Superior's Investigation," page 2, full Exhibit 1 for the plaintiff—these pages 3 and 4 were also prepared after your investigation. A. Yes.

The Court: They were prepared on the night of November 11th.

The Witness: Yes; right.

The Court: Before 11:00 o'clock. Is that right?

The Witness: Right around there.

Q. What inmates besides Pelleccia and Palmigiano would you have occasion to talk to regarding the preparation of your report? A. No one.

Q. No inmates? A. No.

Mr. Fortunato: I have nothing further of this witness at this time, your Honor.

Cross-examination by Mr. Allen

[133] XQ. Two points I want to clear up, Mr. Brule. I am going to show you the original document, of which Plaintiff's Exhibit No. 1 is a copy.

(Document submitted to Mr. Fortunato by Mr. Allen)

Mr. Fortunato: Right.

XQ. (Continued) Now you hold that in your lap and I will ask you some questions about it.

The Court: Plaintiff's Exhibit No. 1 is merely a copy of the original.

Mr. Allen: Of the original. The original is now in the witness's hands.

The Court: What was the source of the copy? Who produced that?

Mr. Allen: We did, your Honor.

The Court: You did.

XQ. (Continued) Now, Mr. Brule, you follow down the page until you come to Luther Gorton's signature. You see where I am directing your attention to? A. Yes.

XQ. All right. The next section of that page deals with what subject matter?

Mr. Allen: Strike that. Let me back off.

XQ. Does that page 1 of Exhiibt 1 break down into three separate sections to be filled out? [134] A. Yes, it does.

XQ. Who fills out the first one? Who did fill out the first section in this case? A. Mr. Gorton.

XQ. Now what is the subject matter of the second section of the first page? A. It is split up into whether the inmate was forewarned of the disciplinary action, witnesses to the infraction, and the superior officer's investigation.

XQ. Who customarily fills out that section of the page? A. Superior officer.

XQ. And in this case will you read into the record what that section says? A. It says: "Was Inmate Forewarned . . ."

Mr. Fortunato: Objection.

The Court: What is the objection?

Mr. Fortunato: I don't think there has been any foundation. There is some typewriting there.

Mr. Allen: I can only do it one at a time.

Mr. Fortunato: There is a space for signature and authentication. I don't think he is doing anything more than reading an exhibit that has been placed in.

The Court: It is for my enlightenment. I haven't read the exhibit. Go ahead.

A. (Continued) "Was Inmate Forewarned Before Disciplinary Action [135] Was Taken?"

The answer is "Yes, by Capt. Brule."

XQ. Who typed in those words: "Yes, by Capt. Brule"? A. The deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. "Did Other Institutional Personnel Witness The Infraction?"

The answer is "No."

XQ. Was that "No" typed in? A. Yes, it was.

XQ. By whom? A. By the deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. "Did Superior Officer Orally Inform Inmate of Infraction?"

It says, "Yes Capt. Brule."

The Court: "Yes Capt. Brule."

The Witness: "Yes Capt. Brule."

XQ. Is that typed in?

[136] The Court: That is yourself?

The Witness: Yes.

XQ. Is that "Yes Capt. Brule" typed in? A. Yes, it is.

XQ. By whom? A. By the deputy warden's clerk.

XQ. At whose instructions? A. At my instructions.

XQ. And under your supervision? A. Yes.

XQ. What else does it say? A. It says, "Superior Officer's Investigation: (see attached report)

XQ. What is typed in on that there? Don't turn it over yet, please. We haven't finished all the typing yet. Is some of that portion typed in? A. Yes, it says "(see attached report)."

XQ. Who typed that in? A. The deputy warden's clerk.

XQ. At whose instructions? A. My instructions.

XQ. And under your supervision? A. Yes.

XQ. And is there a signature line? A. Yes, there is.

XQ. Did you sign on that signature line? [127] A. No, I did not.

XQ. Did you sign the attached report? A. Yes, I did.

XQ. Did you affix the attached report to it? A. Yes, I did.

XQ. And is the attached report adverted to on page 1 the document which my brother has been referring to in his direct examination of you as page 2 of Exhibit 1? A. Yes.

XQ. So that in point of fact page 2 is an amplification of what you would regularly write in on the charging report. A. Yes.

XQ. And customarily under the Morris Rules the inmate or his NPRA advocate is furnished a copy of all of page 1. Isn't that correct? A. Yes.

XQ. After the superior officer has filled in the second portion. Is that correct? A. Yes.

XQ. So that when you told the Court a few minutes ago that page 2 is normally not given to the inmate, what you meant is normally there is no page 2; it is all on page 1. A. Yes.

XQ. Now my brother laid some stress on the fact that you talked to Palmigiano and Gorton and no one else. Let's go into that.

[138] What time did you come to work that night? A. Approximately 3:30 in the afternoon, p.m.

XQ. And you were still on duty at 8:00 p.m.? A. Yes, I was.

XQ. Was there some circumstance or event out of which all of these subsequent events arose? A. Yes, there was.

XQ. What was that event?

Mr. Fortunato: Objection, your Honor.

The Court: What is the objection?

Mr. Fortunato: This is the same position, I think, Mr. Allen took yesterday: That we are trying not to go into the details of the infraction and what exactly transpired.

It makes no difference as to whether it was for stopping a guest or trying to burn the place down. It makes no difference for the purposes of this hearing.

It seems to me Mr. Allen is about to begin inquiring into the subject matter of the infraction and not merely what the charging papers say or how the charging papers were prepared or came to be presented to the various people who are involved before the Court.

Mr. Allen: May I be heard your Honor?

The Court: Certainly.

Mr. Allen: All I am proposing to show through this witness at this time is that this witness was as familiar [139] with the goings-on that evening by personal contact as Gorton was.

The Court: I think you are entitled to show it. I am interested in getting at the truth here, gentlemen. I am not attempting to decide the case without the evidence. Let's have it. There is no jury here.

Mr. Allen: May we have the question read back, your Honor?

The Court: Certainly.

(Last question read)

A. At approximately 20 past 8:00 that evening—

The Court: 8:20?

The Witness: 8:20, yes.

A. (Continued)—Mr. Gorton informed me there was a sick inmate in his wing and the inmate was in his cell.

XQ. Did you go down and see that inmate? A. Yes, I did.

XQ. Did you undertake to afford medical assistance to that inmate? A. Yes, I did.

XQ. Personally, yourself? A. Yes. Well, I called the Medical Center.

XQ. Subsequent to that time did any inmate discuss the health of the sick inmate with you? A. Inmate Pelleccia at 8:30—

The Court: 8:30.

A. (Continued)—and Inmate Palmigiano at 8:45.

[140] XQ. Did you have an extended discussion with Mr. Palmigiano at 8:45? A. Yes, I did.

XQ. So that when Gorton came to you at 9:00 o'clock, you knew all about it, didn't you? A. Yes, I did.

XQ. And you were thoroughly familiar with Palmigiano's attitude? A. Yes, I was.

XQ. You testified on direct examination—

Mr. Fortunato: I ask that that be stricken so far as his being familiar with any attitudes are concerned.

The Court: I think it calls for a conclusion. It may be stricken. Go ahead.

XQ. Now when you went down and saw Palmigiano after Gorton had booked him, you said you discussed—you asked Palmigiano if he had anything to say about it? A. Yes.

XQ. What did Palmigiano say to you? A. He says that he had not incited any disturbance.

The Court: He said what?

The Witness: He said he had not incited any disturbance.

A. (Continued) And he wanted me to put down on my investigation that he had come to me earlier and I refused to give the inmate any treatment—the sick inmate—and

that the inmates had stayed out of their cells because I would not do my job.

The Court: Would you read that answer to me?

[141] (Last answer read)

The Court: You say that he asked you to put that in your report?

The Witness: Yes, he did.

The Court: What was your reply?

The Witness: I told him I would.

The Court: You told him what?

The Witness: I told him I would put it in my report.

The Court: What he had asked you to put in there?

The Witness: Yes.

XQ. Mr. Brule, are you a doctor? A. No, I am not.

XQ. Are you a registered nurse? A. No.

XQ. Are you a licensed practical nurse? A. No.

XQ. Did you receive training from the armed forces as a corpsman or a pharmacist's mate? A. No.

XQ. Are you certified by the American National Red Cross as a first aid instructor? A. No.

Mr. Fortunato: We will stipulate he is eminently unqualified to determine whether anyone is sick or not.

The Court: Or to give treatment. I think that is [142] well established, Mr. Allen.

XQ. In summation then will you tell the Court once more the personal contact that you had with Palmigiano before that evening in connection with the Madden — incident that you had with Palmigiano before Gorton told you that he had booked Palmigiano? A. At approximately 10 minutes to 9:00 that evening Mr. Palmigiano—

The Court: At about 8:50. Yes?

A. (Continued) —Palmigiano came to the door—

The Court: To what door?

The Witness: The rear hall door.

The Court: Came to the rear hall door.

XQ. That is your office? A. Yes.

(Continued) — and told me that if I did not take the Inmate Madden to the hospital immediately,—

The Court: A little slower.

A. (Continued) He told me that if I didn't take the Inmate Madden to the hospital immediately, the inmates were not going to go to their cells at 9:00 p.m.

The Court: "If I did not take Inmate Madden to the hospital immediately, the inmates were . . ." What?

The Witness: —would not go to their cells at 9:00 p.m.

The Court: This is at 10 minutes of 9:00 he told you that?

The Witness: Yes, it was.

XQ. That was the sum and substance of that conversation? [143] A. Yes.

Mr.Allen: You may inquire.

Redirect Examination by Mr. Fortunato

Q. Even though you are not trained as a doctor, Mr. Brule, you determined at some point, though, to call the Medical Center on behalf of the person that you say Mr. Palmigiano was complaining about? A. Yes, I did.

Q. What time did you call the Medical Center? A. 8:25.

Q. When was the first time you had seen Mr. Madden? This is the sick man? A. Yes.

Q. When was the first time you had seen him that evening? A. 8:20.

Q. Had any other officers out there told you he might be sick? A. No.

Q. How did you find out he was sick? A. Mr. Gorton told me the inmate was sick.

Q. He is another officer? A. Yes.

Q. He is the officer that told you he was sick? A. Yes.

Q. Now when you had your conversation with Mr. Palmigiano around [144] 8:45 p.m. or 8:50, you say that this was at the door to the rear hall. A. Yes.

Q. Now you were on one side of the door; in other words, out where your office is. Is that correct? A. Yes.

Q. And he was on the other side of the door facing into the cell block? A. Yes.

Q. In fact that is a solid door, isn't it? A. Yes, it is.

Q. And there is just a hole, a sliding panel, in the door about 6 inches x 6 inches that people look through to talk to each other? A. Yes.

Q. So when he came to the door, that panel was open; and you and he conversed through the little hole in the door. A. Yes, it was.

Q. Now had you been in the rear hall earlier that evening? A. Yes, I had.

Q. Had you been to the sick man's cell before making the call to the hospital? A. Yes.

Q. You had gone and examined—

The Court: He went to the sick man's cell at 8:20. [145] (To the witness) Is that right?

The Witness: Yes.

Q. When Gorton told you at 8:20 that the man was sick, you then went to the cell? A. Yes, I did.

Q. How long did you spend with the sick man? A. Just enough time to ask him what his problem was; probably three, four minutes.

Q. Was Mr. Palmigiano present in the sick man's cell at that time? A. No, he was not.

Q. Did you see Mr. Palmigiano at that time? A. No, I did not.

Q. So after you got through with the sick man, you then went back to your superior office? A. Yes.

Q. When was the next time you then entered the South State Wing? A. About 8:50.

Q. 8:50? A. Yes.

Q. And who had requested that you come in at that time? A. Mr. Palmigiano had told me the inmates would not go

to their cells at 9:00 o'clock unless I took this man to the hospital. I went back in again to check the inmate to see if he had gotten any worse and to explain to him what was being done in his behalf.

[146] Q. You went to the sick man's cell block? A. Yes.

Q. What tier of the cell block is that on? A. L tier.

The Court: What?

The Witness: L tier.

Q. Is that the first, second, or third floor? A. First floor.

Q. Did any other officers accompany you to the cell? A. No.

Q. You went by yourself to the cell? A. Yes, I did.

Q. And this was at 8:50? A. Yes.

Q. And what time did you leave the cell block after that? A. Right after I got through talking to the inmate; three, four minutes later.

Q. You were back at your superior office by 8:55? A. Yes.

Q. What time are the inmates normally locked inside their cells? A. 9:00 p.m.

Q. At 9:00 p.m. you were back in your office? A. Yes.

Q. And what time were the inmates in their cells on November 11th? A. Approximately 9:10 p.m.

[147] Q. 10 past 9:00? A. Yes.

Q. So you at no time in the course of this evening saw and heard Mr. Palmigiano turn to any other inmates and say, "Okay, men, don't go back into your cell."? Did you ever hear him say that to another inmate? A. No, I didn't hear him say that.

Q. Now on the first page of Plaintiff's Exhibit No. 1 there are two lines down from Mr. Gorton's signature the lines that are designed for the superior officer apparently to fill in. One of those lines says—in fact, the second line down from the signature: "Did Other Institutional Personnel Witness The Infraction?" By "Institutional Personnel" do you mean guards or inmates or both? A. Just guards.

Q. Just people employed as guards out there? A. Right.

Q. Do you have personal knowledge as to whether or not the sick man was taken to a hospital? A. Yes, he was.

Mr. Fortunato: One moment, please, your Honor.

(A pause)

Mr. Fortunato: Just one or two other questions, Mr. Brule.

Q. Mr. Palmigiano at no time assaulted you or threw anything at you or anything of that nature?

[148] The Court: There is no claim here that indicates any such incident happened, is there? What will that add to the evidence here? There is no contention by the Government that Palmigiano—

Mr. Fortunato: It was the last question, your Honor. Thank you.

The Court: I think we can do without it.

Mr. Allen: No further questions, your Honor.

The Court: Yoy may step down, Captain.

JOSEPH D. BAXTER, Sworn

Direct Examination by Mr. Fortunato

Q. How are you employed, sir? A. By the State of Rhode Island.

Q. And in what capacity? A. Correctional officer captain, ACI.

Q. And directing your attention to November 13th of this year, were you on duty that day? A. Yes, sir.

Q. What were your general functions that day? A. I was the day captain.

Q. The day captain? A. Yes, sir.

Q. A little more specifically, what would your duties include? A. Well, I have a majority of duties.

Q. Are you in charge of lower ranking officers out there?

[149] A. Yes.

Q. And if they have problems, questions, they might come to you—that type of thing? A. Yes, sir.

Q. Did there come a time during the day of November 13th when one of your duties consisted of serving on a disciplinary hearing board? A. Yes, sir.

Q. Were other officers assigned to serve on that board with you? A. Yes, sir; one other officer and a classification counselor.

The Court: What is that, please?

The Witness: One other officer, a correctional officer, and a classification counselor.

Q. What was the correctional officer's name? A. Norman Carney.

Q. What was the classification counselor's name? A. Mitchell Siner.

The Court: You say Siner?

The Witness: Siner, sir. S-i-n-e-r.

The Court: What again is—

The Witness: He is a classification counselor.

The Court: Classification counselor.

Q. Do you know who Nicholas Palmigiano is? A. Yes, sir.

Q. The gentleman that is seated at counsel table? [150] A. Yes, sir.

Q. Did there come a time on November 13th, as one of your duties as a member, along with the other two men on the disciplinary hearing board, that you were to consider an infraction against him? A. Yes, sir.

Q. Can you approximate at which time this hearing commenced? A. It was between 1:00 o'clock and 3:00 o'clock, sir.

Q. You had some other hearings that day? A. Yes, sir.

Q. When Mr. Palmigiano first entered the room, do you have any recollection as to whether or not he was accompanied by me? A. Yes, sir.

Q. Do you recall—

The Court: What is your answer? Was he?

The Witness: Yes, he was accompanied by this gentleman right here. (indicating Mr. Fortunato)

Q. Were you advised by either Mr. Palmigiano or myself that I was Mr. Palmigiano's attorney? A. Yes, sir.

Q. At that point did you advise me of anything regarding the presence of an attorney at disciplinary— A. Yes, sir. I advised you that this was not a court of law; that this was a disciplinary hearing; and that we had no attorneys attending disciplinary hearings.

[151] Q. At that time— A. (Continued) This is an institutional policy.

Q. Just to go quickly through a bit of a sequence here: At that time Mr. Palmigiano and I removed ourselves from the room. Is that correct? A. And consulted in the rear hall, yes.

The Court: Did what?

The Witness: Consulted with his attorney in the rear hall—Mr. Palmigiano.

The Court: In the rear hall?

The Witness: Yes, just outside the deputy warden's office.

Q. This is a hallway space outside? A. Outside where the disciplinary board was being held.

The Court: Is there a door between the disciplinary board and the deputy warden's office?

The Witness: Yes, sir; there is a door there.

The Court: You don't know what transpired on the other side of the door?

The Witness: No, sir; I don't.

The Court: They left?

The Witness: They left from the office.

Q. Then at some point did we re-enter? A. Yes, sir; after quite a time you re-entered.

Q. Did there come another time when we removed ourselves again together from that room? [152] A. Yes, sir.

Q. And then—

The Court: You came back and then left?

Mr. Fortunato: Yes.

The Court: How long afterwards did they leave?

The Witness: I don't know how long a time elapsed, sir. It wasn't too long.

The Court: Sometime afterwards?

The Witness: Yes, sir.

Q. And then there came a time, shortly after Mr. Palmigiano and I left, that Mr. Palmigiano came back in the room not accompanied by me or any other attorney. Is that correct? A. No, he was only accompanied by Robert Flint.

Q. He had no attorney. A. No attorney.

Q. There was no attorney there?

The Court: He came back with Robert Flint?

The Witness: Yes, sir.

The Court: Had Flint been in the room before that?

The Witness: Yes, sir; he was there over all the different things that were going on between the attorneys. And there were several people come in: Mr. Schwartz and—

The Court: They had come in before you started the hearing?

The Witness: Yes, sir.

The Court: Flint,—

[153] The Witness: Mrs. Katz, I believe, was there.

The Court: Flint, Schwartz, and who else?

The Witness: I believe Mrs.— this young lady right here. (indicating) I am not sure of her name.

The Court: Miss Munson, you mean?

The Witness: Mrs. Katz, and this gentleman, and Robert Flint, and Nicholas Palmigiano.

The Court: Mrs. Katz, Flint, Schwartz, Palmigiano.

The Witness: I can't recall anyone else, sir. I don't know for sure.

The Court: You were hearing other cases on this particular day, were you not?

The Witness: Yes, sir.

The Court: After you had completed the hearing of one or more cases, this case was called. Is that it?

The Witness: Yes, sir.

The Court: Was notification given to Mr. Flint, Palmigiano, or someone that you were ready to hear that case?

The Witness: Yes, sir.

The Court: And then they all came in.

The Witness: Yes, sir.

The Court: Together.

The Witness: Right.

Q. Is it possible that Mrs. Katz was not present but maybe somebody else was? [154] A. It is possible.

Q. Maybe Miss Munson? A. Yes. Yes, I believe—that is right, yes. I think it was; I am not too sure.

The Court: We have with us this morning Mrs. Katz or Miss Munson?

Mr. Fortunato: This is Mrs. Katz. (indicating)

The Court: Was Miss Munson here yesterday?

Mr. Fortunato: No.

The Court: I am in error then. Mrs. Katz. I am sorry. I assumed it was Miss Munson.

Q. When Mr. Palmigiano was in the room by himself after the attorney problem had been discussed—

The Court: Wait a minute here. Am I to understand they were all there for awhile; then they all left—is it the deputy warden's office? They all left the deputy warden's office?

The Witness: Yes, sir; then they come back in.

The Court: Who came back in?

The Witness: They all came back. Then they left again, and Palmigiano and Robert Flint returned.

The Court: I see. In other words, they were in there twice. They left twice.

The Witness: I believe so, sir.

The Court: And then Palmigiano and Schwartz came in. Is [155] that it? Palmigiano and who?

The Witness: Flint; Robert Flint.

The Court: Go ahead.

Mr. Fortunato: Just to try to clear this up a little bit, your Honor—

The Court: I think you had better.

Q. If I were to say to you that when the hearing commenced and you were ready to begin on the Palmigiano case, any time that the board did anything Flint was present with a tape recorder? Can we agree on that? A. Yes, sir.

Q. The first time Palmigiano entered the room he was accompanied by me. He then left the room. He came back into the room again, again accompanied by me and also Ralph Gonnella and Miss Munson.

The Court: How many times did Palmigiano leave the room and come back? I have got notes here at one time he came in with Flint, Schwartz, Mrs. Katz.

Mr. Fortunato: If I can pursue this, your Honor, I think I can focus in on it.

The Court: I think you had better.

(To the witness) This hearing started at approximately 11:00 o'clock. Was that it?

The Witness: No, sir; I believe it started in the p.m.

The Court: 1:00 o'clock?

The Witness: 1:00 o'clock; around there, sir.

[156] The Court: At the outset of the hearing who came in first? Let's get this chronologically.

Mr. Fortunato: May I interrupt the Court for just a minute, please?

Q. You started conducting hearings at 1:00 o'clock? A. Yes, sir.

Q. Did you conduct several before Palmigiano's? A. I don't know how many. Maybe several, yes.

Q. When Palmigiano was first summoned, is it fair to say that the first time that he entered, he entered with me; that then after some discussion about the presence of an attorney, Palmigiano left with me, left the room; after a short period of time Palmigiano re-entered, accompanied by me, I think so,—and would it be fair to say Miss Munson and Ralph Gonnella?

The Court: Miss Munson?

Mr. Fortunato: Yes.

The Court: Not Mrs. Katz.

The Witness: Not Mrs. Katz.

The Court: Palmigiano, Fortunato, Miss Munson.

Q. And after some discussion, at that point Palmigiano, myself, Gonnella—

The Court: Was Gonnella with you when you went in there?

Mr. Fortunato: The second time, I think he was.

Q. (Continued) —Miss Munson, all left the room. Then—

[157] The Court: This is as confusing as can be. Am I to understand when Palmigiano's case was called you and Palmigiano entered the room; there was a discussion about your right to be there and participate; you and Palmigiano left the room?

Mr. Fortunato: That is correct.

The Court: And after some time spent outside the deputy warden's office you, Palmigiano, Miss Munson,—

Mr. Fortunato: Yes.

The Court: —Gonnella and Schwartz—

Mr. Fortunato: I don't know about Schwartz.

The Witness: I think he was there.

The Court: Schwartz's name was given to us a minute ago.

The Witnss: I believe he was there. I could be mistaken but I believe he was there.

The Court: But Gonnella and Miss Munson had arrived in the meantime and went in with you on the second occasion.

Mr. Fortunato: I was as surprised as anybody else that they were there, but they were there.

The Court: Can we conclude Schwartz came in with Mr. Fortunato, Palmigiano, Miss Munson, Gonnella? Or was Schwartz already there?

The Witness: I believe he was in the area, sir, before; and the second time they came in I believe he was there. I think I saw him. I am not positive of it but I think I saw him in the area.

[158] The Court: All right.

The Witness: There was a lot of confusion at that point.

The Court: I would think so. Then there was further discussion?

Q. Then is it fair to say that Palmigiano, myself, and any other attorneys or non-prison personnel left the room at that point? A. Yes, sir.

The Court: With the exception of Flint.

Mr. Fortunato: I don't know about that.

A. Which point are you talking about? You left the room a couple of times.

Q. We have gotten to the point where somehow not only am I in there with Palmigiano, but so are Munson and Gonnella. There came a time when all those people left. Is that true? A. Yes, sir.

Q. Along with Palmigiano. A. Yes, sir.

Q. Then the next thing that happened, so far as getting the case of characters assembled, is that Palmigiano comes

back into the room without any lawyer whatsoever. Is that fair to say? A. Without any lawyer but he had Robert Flint.

Q. Robert Flint was another inmate. A. He was the prison advocate. That is what he called himself.

Q. Flint gave himself that title? A. Yes, sir.

[159] The Court: He gave himself that title?

The Witness: Yes, sir.

The Court: Had he appeared previously in similar cases as the advocate for other prisoners?

The Witness: Yes, sir.

Q. Did he usually bring a tape recorder along to record proceedings? Is that part of— A. If an inmate wants it. The tape recorder was provided that day and was only used for two cases.

The Court: Who provided it?

The Witness: I don't know. The National Prison Reform Association came up with it or I believe Mr. Schwartz or somebody brought it in.

The Court: It was first provided that day, was it?

The Witness: They had one weeks ago, your Honor, and it got broken, and we hadn't had one for a number of weeks. And then this case came up and all of a sudden we had one.

Q. Just to clear this up on the tape recording device: Are you familiar with the rules and regulations governing disciplinary procedures at the ACI? A. Yes, sir.

Q. Are you familiar with the rule contained in those regulations permitting an inmate at his request to have a tape recorder present? A. Yes, sir.

[160] Q. To assist the Court, would it be fair to say that that rule appears at the bottom of page 18? It is listed as rule No. 10 and it says that

> "Any inmate appearing before a disciplinary board may upon request have a recording made of the hear-

ing provided that the equipment for said recording must be furnished by the inmate . . .''?

The Court: What is that again?

Mr. Fortunato: I am asking the witness—

The Court: My copy isn't clear.

Mr. Allen: Your Honor please, I will furnish the witness a copy of the rules.

The Court: I say my copy isn't clear. You go ahead and read it.

Q. At the bottom of page 18 of Defendants' Exhibit A is a paragraph called paragraph 10, and it says that

> ''Any inmate appearing before a disciplinary board may upon request have a recording made of the hearing provided that the equipment for said recording must be furnished by the inmate and that said recordings are to be impounded except for purposes of administrative or judicial review.''

That is part of the rules, in other words. A. Yes, sir.

Q. And during the course of the proceedings Mr. Flint operated the [161]tape— A. Yes, sir.

Q. And when people would speak, he would shove the microphone in their direction so they could say their piece. A. Yes, sir.

The Court: We will take our customary recess at this point.

(Recess)

Q. Captain Baxter, when the time came at the disciplinary hearing that the attorney problem had been taken care of and that only Mr. Palmigiano was in there, with no attorneys, and, of course, Flint was present with his tape recorder, you then told him what he was charged with. A. Yes, sir; I then read the disciplinary report.

The Court: You read the disciplinary report.

Q. Now I show you Plaintiff's Exhibit No. 1, and I am going to go through it, before getting into further questions, page by page, and ask you what pages you had in your possession at the time that the hearing commenced. Did you have page No. 1, of course, without the final disposition written in,—

The Court: You mean the portion above the signature of Mr.—

Mr. Fortunato: —Gorton.

Q. (Continued) Don't you agree—and also the several lines [162] Captain Brule said he filled in?

In other words, directing your attention to the first page of Plaintiff's Exhibit No. 1, you had that page in your possession and it was filled in from the bottom of the page where it says ''Disposition of Case by Disciplinary Board,'' up to the top of the page? A. Yes, sir.

The Court: You mean that portion of page 1 that precedes the decision.

Mr. Fortunato: Yes, your Honor.

Q. And then the second page of Plaintiff's Exhibit No. 1, titled ''Superior's investigation,'' and which has the signature of Ronald Brule on it—you had that in your possession? A. Yes, sir.

Q. On pages 3 and 4 there is a report filled out by Ronald Brule that went to Deputy Remillard. Did you have that in your possession? A. No, sir.

Q. Have you ever seen it before? A. I have seen it since then but I hadn't seen it before.

The Court: You are referring now to pages 3 and 4?

The Witness: Yes, sir.

Q. You had never seen this letter and its contents prior to the hearing on November 13th? A. No, sir; I don't believe so.

[163] The Court: Nor at the hearing?

The Witness: No, sir; not at the hearing.

Q. Are you sure that you never saw it prior to the hearing? A. No, sir; I don't believe I saw it prior to the hearing.

Q. And page 5 of the exhibit is a paper referring to an inmate called Alfredo Pelleccia, signed by one James Gould. Had you seen that prior to the November 13th hearing? A. I don't know if that was going to be heard —the Pelleccia case—but the Pelleccia case was postponed.

Q. Has the Pelleccia case been heard, by the way? A. No, sir; he asked for another postponement yesterday.

Q. On the 13th it was postponed until yesterday? A. It was postponed for one week, and then it was going to be heard yesterday, and he asked for another postponement until Friday.

Q. On the last page, the sixth page of Exhibit No. 1 for the plaintiff, is a document signed by Luther Gorton which makes reference to Mr. Pelleccia and also to one James Madden, who, as the document says, "appeared to me to be sick." That is what part of the document says. Had you seen this prior to the hearing of November 13th? A. I don't recall if I did or not.

Q. Now directing your attention to the first page of Plaintiff's Exhibit No. 1 and the wording which appears above the signature of Luther Gorton — "L. Gorton," it is signed — did you read any of that printing to Mr. Palmigiano? [164] A. Yes, sir; I did.

The Court: You read that to Palmigiano?

The Witness: Yes, sir.

Q. Which portion did you read? Would you tell the Court what you said in general? A. I read the entire—the date and the time of infraction, his name, and the entire entity.

The Court: You read the entire statement bearing Gorton's signature?

The Witness: Yes, sir.

Q. Did you read anything else to Mr. Palmigiano? A. Yes, sir; I believe I read page 2, Captain Brule's investigation report.

The Court: You read what, please?

The Witness: The superior's investigation.

The Court: You also read that?

The Witness: Yes, sir.

Q. That being page 2 of Plaintiff's Exhibit No. 1. A. Yes, sir.

Q. Did you read any other document to Mr. Palmigiano? A. I don't believe so, sir. I don't know. It is on the tape.

The Court: It is on the tape.

Q. As you sit here now, though, your present recollection is you don't believe you read from any other document to him? A. I don't recall, sir.

[165] Q. It is the normal practice at the institution to just read from these two documents. Is that it? A. Yes, sir.

Q. Did you advise him that he had a right to remain silent? A. Yes, sir.

Q. And did you advise him anything that he said might be used against him? A. Might possibly be used against him; yes, sir.

Q. You told him that? A. Yes, sir.

Q. And was that taped by Mr. Flint? A. Yes, sir; I believe it was.

Q. Did you call any witnesses, either inmates or guards, or any other person, for that matter, to testify for or against Mr. Palmigiano? A. No, sir.

Q. Did you consider any photographs of any purported incidents that Mr. Palmigiano might have engaged in in determining this case? A. No, sir.

The Court: Were there any such photographs?

Mr. Fortunato: I wouldn't know, your Honor. I don't believe there were but I just wanted to know.

Mr. Allen: I know of none, your Honor.

Q. Did you have any occasion to receive into evidence any tape [166] recordings that would have recorded any evidence to be considered for or against Mr. Palmigiano? A. No, sir.

The Court: What tape recording are you referring to now?

Mr. Fortunato: I am asking, your Honor, the chairman of the disciplinary board exactly what type of evidence—

The Court: You made reference to tape recordings.

Mr. Fortunato: If in fact any were in existence, did he consider any; and his answer was no.

The Court: Tape recordings of what; some actions—

Mr. Fortunato: Yes, that would have indicated violation of prison rules.

Q. At the time that you read the charge to Mr. Palmigiano was Deputy Warden Remillard also present in the room? A. I don't really know. He left at one point, but at which point he left I don't really know. I think he may have been.

The Court: You think he may have been there?

The Witness: But you are not certain?

The Witness: No, sir.

Q. You were the chairman of the board. Is that correct? A. Yes, sir.

Q. And after you read the charge to Mr. Palmigiano, did he indicate that he chose to remain silent? A. Yes, sir; he did.

[167] The Court: What did he say? Let's not drawn any conclusions.

The Witness: I believe he said, "I stand mute."

The Court: That is all he said?

The Witness: Yes, sir.

Q. Did he at any time make a request to have his attorney present? A. I believe he did, sir.

The Court: When was that request made: At the outset, when they all came in there, or afterwards?

The Witness: At several points before the hearing and during the hearing, right after I read the charges, I believe he requested, or Robert Flint requested for him,—one of the two.

The Court: Flint requested?

The Witness: It was either him or Palmigiano. It was either Flint or Palmigiano requested.

The Court: Requested what?

The Witness: The attorney be present at the hearing.

Q. And the charges were read by you. Is that correct? A. Yes, sir.

Q. And after Mr. Palmigiano informed you that he chose to remain mute, did you make a response to him? A. I probably did. But what I said, I don't recall.

Q. As a result of Mr. Palmigiano's remaining mute, did you have any occasion to tell Mr. Palmigiano that there was nothing further for the disciplinary board to do but to consider the case? [168] A. Yes, sir.

Q. And when it came time, or at that time, when you decided to consider the case, was Mr. Palmigiano asked to leave the room? A. Yes, sir.

Q. Did he leave the room? A. Yes, sir.

Q. And Mr. Flint left the room also at that time? A. Yes, sir.

Q. About how long were they out of the room? A. I don't know how long the board took to render a decision. I don't really recall how much time was involved.

Q. Could you approximate? Was it approximately five, ten minutes, thereabouts? A. Around that, sir.

Q. After the five- or ten-minute absence of Mr. Palmigiano he was called back into the room? A. Yes, sir.

Q. Did Flint come back in too? A. Yes, sir.

Q. What did you say to Palmigiano at that point? A. I believe I read him the results of the disciplinary board findings.

Q. Do you have a present memory of what those findings were? A. I believe we found him guilty.

Q. Would it help you to look at the disposition?

[169] "Board finds inmate guilty. He stood mute and did not call any witnesses. Board has no alternative but to go on disciplinary report. 30 days Segregation B, 30 days loss of good time. Board recommends inmate be seen by classification board for possible downgrading."

Q. You have just read from the first page of Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. The handwriting appearing beneath the words: "Disposition of case by disciplinary board." A. Yes, sir.

Q. Whose handwriting is that? A. Mine, sir.

Q. Does your signature appear thereon? A. Yes, sir; right there. (indicating)

Q. Did the other members of the board sign? A. Yes, sir.

Q. Did they sign in your presence? A. Yes, sir.

Q. So one signature is by Mr. Siner? A. Yes, sir.

Q. You saw him sign. And Mr. Carney signed it too. A. Yes, sir.

Q. Did you inform Mr. Palmigiano of the decision in the words or very similar words to the ones you just read from the bottom of [170] the page? A. Yes, sir.

Q. Did you have any further discussion with him as to the reasons for your decision? A. I asked him if he wanted to appeal.

The Court: You asked him if he wanted to appeal?

The Witness: Yes, sir.

The Court: What was his reply?

The Witness: Yes, sir. He said he wanted to appeal.

Q. Did he say he wanted to appeal or did anyone else say there might be an appeal? A. It could have been Robert Flint. I don't really recall.

Q. So far as your findings and decisions are concerned in this entire case regarding Mr. Palmigiano, is it fair to say that all of the findings and conclusions of the disciplinary board are set forth on page 1 of Plaintiff's Exhibit No. 1 beneath the words: "Disposition of Case by Disciplinary Board"?

The Court: What is that question again?

(Last question read)

A. No; page 1 and page 2.

The Court: Page 1 and page 2.

Q. In other words, page 2, the superior's investigation which is signed by Ronald Brule,—is that part of your decision? A. That was part of the board's decision, yes.

The Court: This is the investigation by the Captain? [171] The Witness: Yes, sir.

The Court: You say that was part of the board's—

The Witness: That was read at the disciplinary board also.

Q. You read it to Mr. Palmigiano? A. Yes, sir. And the board members also heard that investigation report.

Q. But referring to page 2, which Captain Brule prepared, I mean you never prepared page 2, did you? A. No, sir.

Q. And that is Brule's signature, not yours. A. Yes, sir.

Q. That is all Brule's work on page 2. A. Right.

Q. And the only thing written down by the board— A. —is that below disciplinary case report and to the bottom of the page.

Q. In other words, page 1, "Disposition of Case by Disciplinary Board," that is the only written documents or memoranda prepared by the disciplinary board in this matter. A. Yes, sir.

The Court: Was an appeal taken, do you know, Captain?

The Witness: Yes, sir; I believe it was.

The Court: Claimed by Flint or by the plaintiff?

The Witness: The warden handled the appeal, sir.

The Court: Appeal was claimed.

[172] Mr. Fortunato: One moment, please, your Honor.

(A pause)

Q. During the hearing, after all the attorneys left, was anybody present in the room at any time besides Deputy Warden Remillard, yourself, Mr. Carney, Mr. Siner, Mr. Flint, and Mr. Palmigiano?A. No, sir; not to my knowledge.

Q. And when Mr. Palmigiano and Mr. Flint were out of the room and you had your discussion with your other board members—I don't want to go into all the details, but did you discuss the silence of Mr. Palmigiano?

Mr. Allen: Object.

The Court: I will hear you on it.

Mr. Allen: Your Honor please, I think to go into the internal meditations or considerations of the board in coming to a conclusion is far beyond the scope. In other words, he can ask him, if he wants, what evidence he relied on, or the board relied on, but to invade—

The Court: I think you have got something there. I will sustain the objection as to form.

Q. What objects or items did you have before you,—

The Court: What objects or items?

Q. (Continued) — or documents, Captain Baxter, did you and the board have before you and which you considered to be evidence against Mr. Palmigiano? A. We had the disciplinary report. We had the superior officer's [173] report,—

The Court: Disciplinary report. That is Gorton's?

The Witness: Yes, sir.

A. (Continued) — Captain Brule's investigation report, and our knowledge of the institution.

The Court: And your knowledge of the institution?

The Witness: Yes, sir.

The Court: Meaning what?

The Witness: What we considered to be good order of the institution.

Q. When you say you had these reports, in effect you are referring to page 1 and page 2 of Plaintiff's Exhibit No. 1? A. Yes, sir.

Q. And did you consider as evidence in coming to your conclusion the fact that Mr. Palmigiano didn't say anything? A. Yes, sir.

Q. And what conclusions did you draw from that? A. We stood on the reports in front of us.

The Court: Relied on the reports?

The Witness: Relied on the reports as the evidence of the case.

Mr. Fortunato: I have nothing further, your Honor.

Cross-examination by Mr. Allen

XQ. Captain Baxter, how long have you been a correctional officer at [174] the ACI? A. 16 years, sir.

XQ. And you recognize the signature of Officer Gorton on that report? A. Yes, sir.

XQ. And you recognize the signature of Captain Brule on his portion of the report? A. Yes, sir.

XQ. Did Palmigiano ever request to cross-examine Brule or Gorton? A. No, sir.

The Court: Did Flint?

The Witness: No, sir.

XQ. Did Flint or Palmigiano ever request that any witnesses be brought into the hearing room to testify in behalf of Palmigiano? A. No, sir.

Mr. Allen: May I have B for identification?

The Court: B for identification.

XQ. I show you an object, Captain. Do you recognize it? A. Yes, sir.

XQ. Will you tell the Court what it is? A. It is a tape recording of the disciplinary hearing.

XQ. How do you know that that is the tape of the disciplinary hearing as opposed to a rock band? A. It has Mr. Palmigiano's name on it.

XQ. Did you see that writing put on that object? A. Yes, sir.

[175] XQ. Who put the writing on the object? A. Robert Flint.

XQ. And you saw him do it? A. Yes, sir.

XQ. And what became of the tape after the hearing? A. Well, it was supposed to go to me, entrusted to me to go through the proper channels to the warden. But after the tape was shut off, Robert Flint gave it to Mr. Siner to deliver to the warden's office.

XQ. You saw him hand it to Mr. Siner? A. Yes, sir.

XQ. And you recognize that as being the same tape cartridge that— A. He handed it to me. Then I put it on the desk, and he picked it up and it ended up with Mr. Siner.

XQ. You recognize it as the identical one you saw on November 13th at the board? A. Yes, sir.

Mr. Allen: At this time, your Honor, I would like to play the tape so that the witness can identify the voices on the tape and attest that the tape fairly and accurately reproduces everything that transpired before the board so that the Court will have a transcript, in effect, of the hearing.

Mr. Fortunato: I object, your Honor.

The Court: What is the objection?

Mr. Fortunato: That it has not been shown as yet the [176] witness does not have a present recollection of what took place at that hearing.

The Court: That may well be. It would seem if there is a tape of the hearing, conceivably it could be more accurate than any individual's recollections. If there is no dispute about the tape being the tape recording being made at the time, and this is the tape recording that was made at that time and it was made by Mr. Flint, the advocate for the plaintiff here, I think it is highly relevant.

Mr. Fortunato: Your Honor, not to press things, I think your Honor might have made a slight mistake. The testimony to date, I think, has been that Mr. Flint has suggested he is an NPRA advocate, a National Prison Reform Association advocate, and is not in any way the advocate—

The Court: Certainly the evidence up to now has indicated he appeared as an advocate for the plaintiff. I don't have any illusions about that. What was he doing there?

Mr. Fortunato: He was running a tape, we would submit, your Honor.

The Court: I am not that naive. How long would it take to play this tape?

Mr. Allen: 16 minutes, your Honor.

The Court: It may be marked a full exhibit.

Mr. Fortunato: I listened to the tape after the Court suggested that would be an appropriate thing to do yesterday [177] afternoon. Not to further convolute the cast of characters at this hearing, the initial portion of the events that took place at the hearing are not on that tape.

There is no big dispute. I want to clear this up. The initial time that I went in with Mr. Palmigiano by myself and had a brief discussion with Mr. Baxter—

The Court: You went in with Mr. Palmigiano.

Mr. Fortunato: The first time; right. Then we left after being told an attorney could not be present. What went on during that absence is not on the tape. The tape picks up when the whole group comes back in later.

The Court: We will bear that in mind but I don't think it makes much difference. It may be marked a full exhibit, Exhibit B, and we will stop here until 2:00 o'clock. There will be no interruption with respect to the tape recording.

(Defendants' Exhibit B for identification marked in evidence)

(Noon Recess)

AFTERNOON SESSION

2:00 P.M.

The Court: I will change my position, gentlemen, so I will be able to hear better.

Mr. Allen: May we proceed, your Honor?

[178] The Court: Certainly.

XQ. (By Mr. Allen) Now, Captain, I am going to ask you from time to time who the speakers are on this tape. I am going to ask you again for the record. I have put Respondents' Exhibit B, which I asked you to examine earlier,—the tape cassette—in the machine.

You were present when that tape was made, were you not? A. Yes, sir.

Mr. Allen: As we play this, I am going to start it and stop it, and ask you who the speakers are. All I want you to do is tell me who the person is who spoke just before I shut it off, so the Court will come to know who the various cast of characters are on the tape.

I am now starting the tape.

(Tape played as follows:)

"Testing 1, 2, 3. Try playing it; try playing it; try playing it."

The Court: What is that?

Mr. Allen: They are fussing around with it in the beginning, your Honor, to try to make it work.

(Playing of tape resumed as follows)

"The next case that will be recorded is that of Nicholas A. Palmigiano. Chairman of the Board on today's date, November 13th, is Captain Baxter; and from Classification Department is Mr. Siner; and also [179] a voting member of the board is Officer Carney. The board is about to begin."

XQ. Who was that speaking? A. Robert Flint.

Mr. Allen: I will now start the tape again.

The Court: Flint described the nature of the hearing and the membership of the board. Right?

Mr. Allen: Yes, your Honor.

(Playing of tape resumed as follows:)

"The tape we are just playing. We seem to be having a little difficulty with it at the moment. The tape is now playing."

The Court: Who was that speaking?

The Witness: Robert.

(Playing of tape resumed as follows:)

"We want to keep going here so that we can accomplish something this afternoon. I mean: Is there any reason for playing the tape over and over again at this time or . . ."

XQ. Whose voice is that? A. Deputy Warden Remillard.

XQ. Let me ask you: Where was this hearing being held? A. In his office.

The Court: Remillard's office?

The Witness: Yes, sir.

[180] (Playing of tape resumed as follows:)

"The tape is not being played over and over again. What we are doing is trying to get the tape recorder in operation so that this proceeding may be recorded in accordance with the rules and regulations laid down by Judge Pettine.

"Okay.

"And that is why we have all been fooling around, as you call it, with the tape recorder. And the board has already been introduced, and this is Steve Fortunato, who is an attorney, acting on behalf of Nicholas A. Palmigiano."

XQ. Who was that again? A. That was Mr. Fortunato—

XQ. No, I mean — A. Robert Flint introducing Mr. Fortunato.

(Playing of tape resumed as follows:)

"Yeah, this is Steve Fortunato, attorney for Nicholas Palmigiano. And when I was in the room about five minutes ago I was informed that no attorneys would be present. And then I asked for a few minutes to confer outside of this room with Nicholas Palmigiano, my client, to determine what course of action we should pursue. While I was conferring with Mr. Palmigiano, Deputy Warden Remillard introduced himself to me and did mention that [181] this was the policy and that I had the right to advise my client to remain mute throughout the proceedings but that would be a detriment to his defense. I then conferred, in the absence of Deputy Warden Remillard, with my client and advised him that in light of the fact there were possible future criminal proceedings pending, that he should not proceed at this time because he would be at a substantial disadvantage, both in putting on his own case, and in cross-examining and confronting those witnesses who would be put on by the prison officials against him. So, therefore, we will not remain for this — this matter now. I should — I do not say remain for this 'hearing' because I don't regard it to be a constitutionally permissible hearing because without counsel present and with the threat of possible criminal prosecutions it is not a constitutionally permissible hearing."

XQ. Who was that? A. That was Mr. Fortunato.

The Court: Would it be possible to play that back?

Mr. Allen: Yes, your Honor.

The Court: From the very beginning. I mean Mr. Fortunato's statement.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

[182] "There is also an institutional policy — I was looking for it and I will see if I can find it — where

a postponement may be allowed up to one week but then the case will be heard. This is the directive from the warden."

XQ. Who was that speaking? A. The last person speaking was Deputy Warden Remillard.

Mr. Allen: Would you like to hear that again, your Honor?

The Court: I would, yes.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"I was just going to ask him."

XQ. Who made the remark: "I was just going to ask him"? A. I think I did. I made that remark.

(Playing of tape resumed as follows:)

"Nick, would you care for a one-week postponement?"

The Witness: I said that.

The Court: That question was asked of him by whom?

The Witness: By me.

(Playing of tape resumed as follows:)

"If he can go back to the population."

XQ. Who answered it? A. I believe Mr. Fortunato.

The Court: What was the answer?

Mr. Allen: I backed up to hear the question again. Now here comes the answer.

[183] (Playing of tape resumed as follows:)

"If he can go back to the population."

The Court: This is Mr. Fortunato?

Mr. Fortunato: Yes.

(Playing of tape resumed as follows:)

"He goes back to the status he was in.

"I see. And also a question as to a postponement from what, from this type of hearing to the same type in a week?

"Same type of hearing, yes. If he wants a week, we will give him a week.

"Without counsel.

"The hearing will be the same as it is right now."

XQ. Who made that remark: "The hearing will be the same as it is right now"? A. I did.

(Playing of tape resumed as follows:)

"He may have inmate counsel, NPRA representative, or a classification counselor. But this is what is allowed."

The Witness: The last person speaking?

Mr. Allen: Yes.

The Witness: Deputy Remillard.

(Playing of tape resumed as follows:)

"This is Deputy Warden Remillard just spoke.

[184] "In light of what you said, that the hearing a week from now would be conducted on the same ground rules as the one that you have scheduled for today, we will not ask for a postponement because we don't even consider it a hearing to be postponed from. And Mr. Palmigiano has been present throughout — throughout this."

Mr. Allen: Fortunato.

(Playing of tape resumed as follows:)

"Who are the other people present just so we can — have you got it all on there?

"Well, I named the board but I did not name the Deputy Warden Remillard . . . ."

XQ. Who is speaking now? A. Robert Flint.

(Playing of tape resumed as follows:)

". . . He was also present. And, in addition, was Ralph Gonnella, who is an external director and an attorney-at-law for the Inmate Legal Assistance Program. And he was present, and an external director on the NPRA. And myself, Robert W. Flint, as advocate on behalf of the NPRA prisoners, and Allegra Munson, who is an advisor to the NPRA and also an attorney-at-law. And, of course, the defendant, Nick Palmigiano."

Mr. Fortunato: Could that section be played back again, please?

[185] (Last portion of tape played back)

The Court: Who is making this statement?

Mr. Burke: Flint.

XQ. Is that correct, Captain Baxter? Was it Flint making that statement? A. Just this last statement; yes, sir.

XQ. In which he says: "And myself, Robert W. Flint, as advocate on behalf of the NPRA prisoners, . . ."? A. Yes, sir.

XQ. That is him? A. Yes, sir.

XQ. Now the tape appears to stop at this point, Captain Baxter. What happened? A. I don't know. I guess Flint wasn't familiar with running a tape recorder and he had a lot of problems with it.

XQ. Did he leave the room at any point during this — A. He went out when they went out to confer in the hallway outside the office.

XQ. Did he leave the tape running while he was outside? A. No, no.

(Playing of tape resumed as follows:)

"Okay. The people who were previously here have left the room. Now only in the room is Deputy Warden Remillard, Captain Baxter, Mr. Siner, Mr. Carney, and the only voting members are Captain Baxter, Mr. Siner, [186] and Officer Carney. And, also, prisoner advocate, Robert W. Flint, and Nicholas A. Palmigiano is present."

XQ. Who is that speaker? A. Robert Flint.

XQ. And was Palmigiano in fact in the room when he made this statement? A. Yes, sir; when he made that statement.

(Playing of tape resumed as follows:)

"The Deputy Warden wants to make some comments about some delay.

"No, I am not making any comments of some delay. I just want to make it clear that I am here doing other work, and I will not interfere or speak for or against anything that happens before this board.

"Well, do you think your presence may have some or any influence upon the board members insofar as their deliberations are concerned?"

XQ. Who is asking him that question? A. The first speaker was the deputy. The second speaker was Robert Flint.

(Playing of tape resumed as follows:)

"It certainly has some potential influence upon them."

The Court: Who said that?

The Witness: Flint.

(Playing of tape resumed as follows:)

[187] "Leave deliberations. Okay?

"I will even go that far for you people, leave my own office. All right. Anything else you want?

"This is a meeting of the disciplinary board. Nicholas Palmigiano, what is your date of birth?"

XQ. Speaker? A. That is me.

(Playing of tape resumed as follows:)

"Captain, sir, if the answer can't be heard, I would like to pass the mike over.

"May 30th, 1938."

XQ. Who was that speaker? A. That is Nick Palmigiano.

The Court: "May 30th, 1938"?

The Witness: That is his date of birth.

(Playing of tape resumed as follows:)

"November the 11th, 1972, at 8:15 p.m., you were booked by Mr. Gorton . . . ."

XQ. Who is the speaker now? A. I believe it is me.

(Playing of tape resumed as follows:)

"Charges: 'Inciting a disturbance and disruption of the ACI operations, which might have resulted in a riot. At 8:50 P.M., and from then until 9:05 P.M., I saw and heard inmate Palmigiano going among the other inmates and [188] telling them not to go to their cells when the buzzer sounded at 9:00 P.M.' Inmates's attitude is listed here as 'Poor and demanding.' The officer, Mr. Gorton, notified Captain Brule. Captain Brule investigated the case. 'Inmate denies infraction as written, he says the reason he came to the Rear Hall to see me was that I had informed — I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M.'. . ."

XQ. Who is speaking now? A. I am speaking.

XQ. Were you reading from some document? A. Reading from the disciplinary report and the superior officer's report.

XQ. Which you have been shown earlier as an exhibit in this case — a copy of which you have been shown earlier? A. Yes.

The Court: This was Captain Baxter speaking?

The Witness: Yes.

(Playing of tape resumed as follows:)

". . . 'He says the reason no one went to their cells was that I had not and would not do — would not do my job, under pressure.'. . ."

" 'Until pressured.' "

" 'Until pressured.' "

[189] "That was Mr. Remillard who just helped read the book who previously said he would not interfere with the proceedings: 'I was just in there doing office work.' "

XQ. Who is that speaking? A. That is Robert Flint.

(Playing of tape resumed as follows:)

"May I say at this time that I am leaving the office so that nobody can feel that I am prejudicing the board in any way?"

XQ. Who was that? A. Deputy Remillard.

XQ. Did he in fact leave the office? A. I believe he did at that moment.

XQ. As a matter of fact, have you heard this tape before? A. Yes, sir.

XQ. Can you hear the door closing behind him on the tape? A. I don't know. I don't recall.

(Playing of tape resumed as follows:)

"Thank you for leaving.

" 'Inmate Palmigiano says he is not sorry and would take similar action again if necessary. Inmate Palmigiano was informed to contact his lawyer, that he — as he may be prosecuted for a violation of state law. Inmate Palmigiano ordered tagged and fed in. He defiantly appears to be a threat — definitely appears to be a [190] threat to the security and order of the Institution.' Signed: 'Captain Brule.' . . ."

XQ. Now who is speaking? A. Me.

XQ. You, Captain Baxter? A. Captain Baxter.

The Court: You were reading the report of —

The Witness: I was reading the report of Captain Brule.

XQ. And Palmigiano was in the room facing you? A. Yes, sir.

(Playing of tape resumed as follows:)

"What happened here, Nick?

"In view of the fact that you just said that this particular book may be the subject of criminal prosecution or some kind of a criminal case, we feel that it is necessary that an attorney be present at this board hearing because to proceed is only a farce because a man cannot adequately defend himself at such a hearing without the assistance of counsel with the pending disciplinary matter before the board, as written into the report."

XQ. Who was that speaking? A. Robert Flint.

(Playing of tape resumed as follows:)

"At this time I have to take my attorney's advice and remain mute. . . ."

[191] The Witness: Nicholas Palmigiano.

The Court: ". . . take my attorney's advice and remain mute." All right.

(Playing of tape resumed as follows:)

"I would also re-ask if my attorney could be present."

The Court: I didn't get that.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"His request is that an attorney be present and it might be noted that the attorney is right outside the door and available to this board. It is the same Mr. Fortunato who was in here just a few minutes ago. He is an attorney at law."

XQ. Now after Palmigiano finished speaking, who was the next speaker? A. Robert Flint.

(Playing of tape resumed as follows:)

"Disciplinary boards are disciplinary boards. They are not a court of law. They will be treated as a disciplinary case. You have been offered a postponement. You refused it. We do not have, as an institutional policy, attorneys sitting in on disciplinary hearings. Your request is denied."

XQ. Who was that, Captain? A. Captain Baxter.

(Playing of tape resumed as follows:)

[192] "I would like to point out that under the rules and regulations governing disciplinary procedures, especially at a board, on page 17, Section I, it is clearly written that 'Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take.' In view of this language and in view of the fact that an attorney is right outside the door we persist in our request that you make an attorney available to Nicholas Palmigiano in this particular matter."

XQ. Who is that? A. Robert Flint.

(Playing of tape resumed as follows:)

"I have already answered that question. The request for an attorney is denied.

"We object most strenuously to any action being had on this matter without an attorney being present in this room.

"Do you intend to answer any questions for the board?"

[193] XQ. Who was that speaking? A. That was Flint.

Mr. Allen: I want to go back.

(Last portion of tape played back as follows:)

"I have already answered that question. The request for an attorney is denied."

XQ. Who is that? A. That is me.

(Last portion of tape played back as follows:)

"We object most strenuously to any action being had on this matter without an attorney being present in this room."

XQ. Who is that? A. Robert Flint.

(Last portion of tape played back as follows:)

"Do you intend to answer any questions for the board?

"No."

XQ. Who asked that question and who answered it? A. I asked Nick Palmigiano that question, and he answered it.

(Playing of tape resumed as follows:)

"You can step outside. We will call you back in."

The Court: What was that?

Mr. Allen: I will play that again. It is a little confusing right there.

(Last portion of tape played back)

[194] The Court: Who said: "You can step outside."?

The Witness: I did.

The Court: You told Palmigiano to step outside?

The Witness: Yes, sir.

XQ. Now the tape apparently stopped there. Is there a reason for that, Captain? A. Yes, the board was making the decision on the case.

(Playing of tape resumed as follows:)

"After being told to leave the room while the board deliberated for approximately five minutes, Flint and Palmigiano are now back in the room where this board is taking place allegedly.

"The board finds the inmate guilty . . ."

XQ. Who made that introductory statement? A. Flint made the introductory statement. Now I am speaking.

(Playing of tape resumed as follows:)

"The board finds the inmate guilty. He stood mute and did not call any witnesses. The board has no alternative but to go on the disciplinary report — what

is written on the disciplinary report. The sentence is 30 days' Segregation B, 30 days' loss of good time; the board recommends that Nick Palmigiano be seen by the Classification Board for possible downgrading. Do you wish to appeal?

"We do appeal the entire action of this board today —"

XQ. Who is speaking now?

[195] The Court: Just a moment. 30 days' segregation?

Mr. Allen: I will run it again.

(Last portion played back)

(Playing of tape resumed as follows:)

"We do appeal the entire action of this board today — the entire action of the board today; most strenuously object to the board's deliberations and this disciplinary action — alleged disciplinary action being taken; most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this board is concerned today.

"Your appeal is so noted. You will return to the status you were in before you hit the board."

The Court: What is that again? This statement was made by whom: "We do appeal the entire action . . ."?

The Witness: Robert Flint.

(Last portion of tape played back)

XQ. Who made that last statement? A. I did.

The Court: To whom was that addressed?

XQ. Whom was that addressed to? A. My address was made to both Nick Palmigiano and Robert Flint that appeal was noted and he was returned to the status before he hit the board.

The Court: Hit the board?

[196] The Witness: — he came to the board.

The Court: You used the words: "Hit the board"?

The Witness: Yes, sir; I did.

XQ. Is that prison slang? A. It is my own, sir.

Mr. Allen: I want to make sure we have it this time.

(Last portion of tape played back)

(Playing of tape resumed as follows:)

"We will put these tapes into your hands, Captain Baxter, in a sealed envelope and we will assume that you are going to make these available to whatever authorities may request them. Is this so?

"Yes, sir; that is so.

"All right. Captain Baxter is assuming responsibility for this tape."

The Court: Perhaps you had better play that back for Mrs. Archambault.

Mr. Allen: I told Mrs. Archambault I would leave her the tape and player. I will leave her the player, and I am sure Mr. McQueeney will make arrangements for Mrs. Archambault to hear the tape at her leisure.

The Court: I think you had better play it back in the presence of counsel.

Mr. Allen: All right.

[197] (Last portion of tape played back as follows:)

". . . You will return to the status you were in before you hit the board."

The Court: Let's go back further than that.

(Last portion of tape played back as follows:)

"Do you wish to appeal?

"We do appeal the entire action of this board today — the entire action of the board today; most strenuously object to the board's deliberations and this disciplinary action — alleged disciplinary action being taken; most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this board is concerned today.

"Your appeal is so noted. You will return to the status you were in before you hit the board.

"We will put these tapes into your hands, Captain Baxter, in a sealed envelope and we will assume that you are going to make these available to whatever authorities may request them. Is this so?

"Yes, sir; that is so.

"All right. Captain Baxter is assuming responsibility for this tape."

(Playing of tape concluded)

XQ. (By Mr. Allen) Is there anything more that transpired after that, Captain? [198] A. I don't believe so. I think that is it.

Mr. Allen: I represent to the Court I have listened to it for another five minutes and there is nothing more on it.

XQ. Captain, I ask you: Is this an accurate transcription of what transpired on November 13th during the Palmigiano hearing? A. Yes, sir.

XQ. Have there been any deletions? In other words, was anything said there, that you know of, that is not on the tape? A. Not to my knowledge, sir.

There is one point I would like to raise. According to the tape I was placed in charge of the tape. And after the tape was shut off, Robert Flint decided that it would probably be safer in Mr. Siner's hands and he got the tape and he delivered it to the warden's office.

The Court: Flint gave the tape to Siner?

The Witness: Yes, sir. After he put this on the tape, that I was in charge of the tape, it went to Mr. Siner's hands.

The Court: And he delivered it to the warden?

The Witness: Yes, sir.

Mr. Allen: I have no further questions of the witness. You may inquire.

Redirect Examination by Mr. Fortunato

Q. Now, Captain Baxter, have you served on disciplinary boards before? A. Yes, sir.

[199] Q. Had you wanted to, you could have called Brule or Mr. Gorton or anybody else you chose to. A. Well, it would have created a problem to call them. It wasn't their shift. They weren't on.

Q. But I mean you have the authority to. If a captain, who is conducting a disciplinary hearing, says to another officer, "I would like you to be present to give some evidence," they would come. Is that part of the normal custom and practice? A. If it involved overtime, I would have to check with my superiors to okay the overtime.

Q. Is that done or can that be done? A. I have never—

Q. Whatever the financial arrangements are for the men who come and testify, you can bring in other witnesses, inmates or guards, to testify at a hearing on behalf of the prison officials. A. I would have to acquire permission to pay the overtime; yes, sir.

The Court: That would be overtime to whom, Gorton?

The Witness: Yes, sir; Gorton and Captain Brule are on another shift.

Q. I mean — the point I am making is you have the authority to do that under the rules, don't you, should you want to? A. I would have to get the authorization for paying the overtime first. Then I could do it.

Q. Leaving the budgetary considerations to somebody else, I mean, as [200] a captain in charge of a disciplinary board, I know you don't have subpoena power but you can ask pople in the institution to come in and give testimony at a hearing that is being conducted. A. Yes, sir.

Q. You can? A. Yes, sir.

Mr. Fortunato: I have nothing further.

Mr. Allen: No further questions, your Honor.

FRANCIS A. HOWARD, Sworn

Direct Examination by Mr. Fortunato

Q. Sir, what is your occupation? A. I am warden of the ACI.

Q. How long have you held that position? A. A little better than two years.

Q. Generally, as warden, what do your duties consist of? A. I oversee the operation of the ACI.

Q. You are the chief administrator of the Adult Correctional Institutions? A. Right.

Q. Do you know Nicholas Palmigiano? A. I do.

Q. He is confined therein under sentence of law? A. Yes.

Q. Directing your attention to November 14th, 1972, did you have any [201] occasion to review any disciplinary action that had been taken regarding Mr. Palmigiano on November 13th? A. I believe it was the day after the hearing?

Q. Yes, I think we can agree the hearing was on the 13th. A. Then I saw him on the 14th.

The Court: What, please?

The Witness: Then I had a brief meeting with Nicholas Palmigiano on the 14th.

Q. Did you have a meeting with him the day after the hearing? A. I did.

Q. The hearing being, of course, the one Captain Baxter presided over. A. Yes.

Q. Was the purpose of your inquiry on the 14th to review the actions of the disciplinary board? A. That is correct; also, to give Nick an opportunity to make any oral appeal he cared to.

Q. In reviewing the action of the disciplinary board, what documents if any did you have before you that had been sent to you by the disciplinary board? A. I had the original disciplinary report and the attached investigation report from Lieutenant Brule.

Q. I show you a copy now of the first page of Plaintiff's Exhibit No. 1. You had that first page? A. Yes.

[202] Q. It had all been filled out, including the handwriting at the bottom by Captain Baxter? A. Yes.

Q. And then you had the second page of the report, or, I should say, the second page of Plaintiff's Exhibit No. 1, which is Captain Brule's superior's investigation report. A. Yes.

Q. That came to you attached to the first sheet? A. Yes.

Q. Gorton's and Mr. Baxter's.

Were any other papers sent to you? A. I believe I had another report from Lieutenant Brule, a two-page report.

Q. I show you pages 3 and 4 of Plaintiff's Exhibit No. 1. A. Yes, I had that report also.

The Court: Is that another report of Captain Brule?

The Witness: Yes.

The Court: Pages 3 and 4; further report of Captain Brule.

Q. Do you recall having any other papers? A. I believe that is all I had. But I recall I may have read other reports from other personnel concerning the entire incident.

The Court: What is that, please?

The Witness: Concerning the incident of that evening, of the 11th.

Q. You might have read a report involving Alfredo Pelleccia. Correct? [203] Is that his name? A. Yes.

The Court: Alfredo who?

Mr. Fortunato: Pelleccia.

Q. Did you at sometime on the 14th determine to uphold the decision of the board? A. I did.

Q. And before making that determination had you heard the tape that was just played in this courtroom? A. I had not heard the tape.

Q. Before making your decision did you have any contact with Mr. Palmigiano? A. I did. I had possibly a five-minute meeting with Nick and Lieutenant Detonnancourt.

The Court: And what?

The Witness: One of my lieutenants, Detonnancourt.

The Court: Did you have this interview with them together or separately?

The Witness: The three of us sat in the deputy warden's office.

Q. And did you ask Mr. Palmigiano any questions? A. I did. I told him that I was considering his appeal at that time and I wanted to give him an opportunity to say anything he wanted to in his behalf. I told him I had the documents — I held them up — of the disciplinary board. He just looked at them. [204] And Nick replied that he was standing mute on the advice of his attorney.

Q. Did you talk personally to any witnesses to the incident at that time? A. I am not certain. Possibly Lieutenant Brule. But I am not certain of this.

The Court: Lieutenant who?

The Witness: Brule.

Q. You don't recall whether you saw Mr. Brule or not? A. I am not certain. I know I talked to Lieutenant Brule about this at some time, but it may have been after this hearing. And Lieutenant Brule is the only witness that I have talked with.

Q. And that may well have been after you made your decision on the 14th? A. Yes.

The Court: Your interview with Palmigiano, and whoever it was with him, occurred on the 14th of November?

The Witness: Yes, your Honor.

The Court: In the deputy warden's office?

The Witness: Correct.

The Court: But Captain Brule was not there?

The Witness: He was not there.

The Court: And your decision was made that day, was it?

The Witness: It was made shortly after that brief hearing.

The Court: So that the chances are you didn't see Captain [205] Brule until sometime later?

The Witness: Your Honor, my best guess is I did not talk to him about the incident that day or the day before.

Q. And was Mr. Palmigiano present when you told him what your decision was? A. Yes. I believe I told him I was going to deny his appeal.

Q. That was after you had asked him what he had to say, and he said he remained mute. Was it at that point you then said, "Well, I am going to have to deny your appeal."? A. Yes.

Q. Now do you know where Mr. Palmigiano was taken when you and he finished your meeting on the 14th? A. I do not. I assume he went back to his cell, but the routine at that point is as soon as I communicate the appeal has been denied, then the sentence is implemented. And I am sure it was either implemented that night or the following day.

Q. So you can say that on or about the evening of the 14th, or no later than the 15th, his sentence began as a result of the hearing of the disciplinary board. A. I would say in all probability that is what happened.

Q. At the present time is it true that he is in a section of the prison known as punitive segregation? A. Yes.

Q. And this is a result of the sentence? A. Yes.

[206] Q. And punitive segregation means he is under lock and key 23 hours a day? A. 24 hours a day for the first five days. Then it is 23 hours.

The Court: 24 hours a day —

The Witness: — for the first five days.

The Court: For the first five.

The Witness: All additional time would be for 23 hours per day.

Mr. Fortunato: Thank you.

Q. And he cannot see —

The Court: 30 days are involved here?

The Witness: Pardon me, your Honor?

The Court: The sentence here was 30 days?

The Witness: 30 days; correct.

The Court: So it would be 23 hours a day for —

The Witness: 25 days.

Q. And his visits are restricted to all but attorneys. Is that fair to say? A. Yes.

Q. He takes his meals in his cell? A. Yes.

Q. There are no other inmates walking around back there that can visit him. Everybody back there is in a cell. Is that true? A. Generally, yes.

Q. Are his reading restrictions different than those in general [207] population? A. Yes.

Q. Could you briefly tell us how they would be different? A. His selection of reading material is very limited. We do permit him to read — I don't know — one or two books a day. But if he were in population he would have the entire library available to him.

Q. How about any rehabilitative or educational functions while he is in punitive segregation?

The Court: Any rehabilitative or what?

Mr. Fortunato: Educational programs.

A. No.

Q. He cannot participate in any? A. Correct.

Q. Now prior to his being placed in panitive segregation, is it a true statement that one of his jobs at the prison — one of Mr. Palmigiano's jobs was that of barber? A. Yes.

Q. Does he receive payment for performing his duty? A. Yes.

Q. How much is he paid? A. I am not certain. I am told it is $1 a day. I know that is our maximum inmate wage.

Q. Does he receive any wages while kept in punitive segregation? A. He receives nothing, no wages.

[208] Q. Now do the findings of the disciplinary board and also your upholding their decision—does that become part of his permanent prison record? A. Yes.

Q. And that would be considered by any parole board that might review his case? A. Yes.

Q. And it would be considered by the classification board if they decide to classify him one way or the other? A. Yes.

Q. Or if he were to go into a work release program, they would take this disciplinary action in consideration? A. Yes.

Q. If prior to being placed in punitive—where he was in the general population, that is known as the maximum security building? A. Yes.

Q. You also have a minimum security building? A. Yes.

Q. And is there something in between minimum and maximum? A. We have a minimum-medium building. It is a combination of two categories, plus work release.

Q. For him to get into any of those categories from maximum his disciplinary report, including the records resulting from the hearing in court,—that would all be considered? [209] A. Yes.

Q. One of the recommendations of the disciplinary board, and which you upheld, was that the board recommended that the inmate be sent to the classification board for downgrading. Prior to the findings of this disciplinary board what classification did he have? A. He would be in class A.

Q. Could the classification board put him down into class B? A. They could.

Q. And if he went into class B, he would then be kept locked up for 23 hours a day. Is that true? A. Yes.

The Court: Locked up for 23 hours a day?

The Witness: Yes.

The Court: Seven days a week?

The Witness: Yes.

The Court: That means no yard privileges or anything of that sort?

The Witness: That is right.

Q. And that would commence to run when he finishes this 30 days if in fact the classification board goes along with the recommendation of the disciplinary board? A. Yes. I should explain. That is a recommendation to the classification board, and that is all it is. There is a five-man board that sits and votes, and the majority votes rule. In other [210] words, a disciplinary board is not considered a vote.

Q. I understand that, but they are recommending declassification. A. Yes.

Q. And you upheld their vote recommending downgrading—declassification. A. Yes.

Mr. Fortunato: One moment, please, your Honor.

The Court: Certainly.

(A pause)

Q. Now a man in class B—

The Court: Class B.

Mr. Fortunato: B.

Q. (Continued) — he also couldn't have a prison job and earn any money, could he?

Mr. Allen: Object. This is all a matter of law, your Honor. It all appears on pages 7 and 8 of Respondents' Exhibit A, and I suggest it is a matter of law and is appropriate to the Court's scrutiny.

The Court: 7 and 8?

Mr. Allen: Yes, your Honor. It commences on page 7, three-quarters of the way down the page, and continues through most of page 8, more than half of page 8.

Your Honor will observe that category B, which the witness is being asked about, is defined as a matter of law on those pages.

Q. Warden Howard, you are familiar with the regulations governing [211] disciplinary, classification, and mail procedures that have been promulgated pursuant to the case of *Morris* v. *Travisono*? A. Yes, I am.

Q. And you are the man entrusted with seeing that these are applied and carried out. A. Yes.

Q. Is it your understanding of classification B that a man cannot, while he is in classification B, work and perform services and receive payment for them?

Mr. Allen: Objection.

The Court: What is the objection?

Mr. Allen: The exhibit speaks for itself, as one ground; and the exhibit is a matter of law, not a matter of fact, and therefore not a subject for inquiry by counsel of the witness.

The Court: Is there anything in category B, to which you have referred, that makes any reference to whether or not compensation can be paid for work rendered?

Mr. Allen: Your Honor will see near the bottom of page 7 the last sentence:

"Work eligibility is suspended in this category . . ."

The Court: That would indicate then that he cannot work and cannot be compensated.

Mr. Allen: Yes, your Honor.

Your Honor will notice on page 8 it also addresses itself to the matter of time in the cell, yard privileges, mail, visiting [212] privileges, many other things.

The Court: I think I misunderstood the warden or he misunderstood my question. I thought the warden told me that he was restricted to his cell after the first five days for 23 hours a day and did not have yard privileges.

The Witness: That is correct, your Honor. We have been talking about two categories. Presently he is serving 30 days in punitive segregation. The first five days: No exercise out 24 hours a day.

The attorney then questioned me about classification B. That is another category which requires one hour of exercise every day.

The Court: But the additional 25 days of the sentence that has been imposed on him do not permit of any yard privileges, do they?

The Witness: It is during that one hour that would be optional with the administration to exercise him inside or out, weather conditions and manpower conditions controlling.

The Court: In other words, it is not an absolute right to him?

The Witness: No, but there is an absolute right to exercise, which means out of that cell walking somewhere.

Q. For one hour. A. For one hour.

Q. But to qualify it, under the sentence of 30 days he is in a [213] category known as punitive segregation. A. Right, which is different from segregation B.

Q. Which is different from segregation B, which he will be placed in,—

The Court: Assuming he is classified—

Q. (Continued) — assuming he is downgraded at the recommendation of the board. A. Yes.

The Court: Are there any specific provisions in these regulations relating to prisoners who are confined pursuant to punitive segregation?

Mr. Allen: Yes, your Honor; there are.

The Court: We have here categories A, B, and C.

Mr. Fortunato: On page 19, your Honor,—

The Court: Page 19?

Mr. Fortunato: Yes. —the third line down says:

"Actions Taken by a Disciplinary Board may be as follows:"

and No. 5 under that says:

"One to thirty days placement in punitive segregation."

The Court: I see that, yes.

Q. Warden Howard, anywhere in these regulations—that is, the ones promulgated pursuant to *Morris* v. *Travisono* —is there a definition of punitive segregation as such, that you are aware of? A. I am not aware of any definition of punitive segregation, but I [214] believe there are some further requirements—restrictions as to punitive segregation. There are some minimum standards the administration must meet. It is one of the latter pages.

Q. Showing you Defendants' Exhibit A, and directing your attention to page 23, would these be what you are referring to: The minimum standards?

(Witness indicates)

The Court: It says: "Except as otherwise provided, . . ."

". . . every inmate of the ACI in categories ABC and D or disciplinary status, excluding punitive segregation, shall be entitled . . ."

So, in other words, these minimum standards don't apply to punitive segregation.

Mr. Allen: Object.

The Court: What is the objection?

Mr. Allen: Because he says these standards don't apply. If he turns the page over, the whole page is devoted to minimum standards of confinement while in punitive segregation.

Mr. Fortunato: Right. In other words, I on 23 does not apply; II on page 24 does apply. Okay.

The Court: Let's see. What is 24, II? Where is it?

Mr. Allen: It starts at the top of the page, your Honor.

The Court: There is no II on top of the page I am looking at, page 24.

Mr. Fortunato: I am handing the exhibit up, your Honor.

[215] The Court: It is apparently a different page than I have got here. Somewhere along the line, gentlemen, I seem to have a page 24 that—

Mr. Allen: I will be glad to furnish you with—

The Court: Let's see. Wait a minute now. Maybe it appears on the previous page or else this is so fine, it didn't take. I have got it, at the top of page 24. They are spelled out there then, so there isn't any room for ambiguity—

Mr. Fortunato: Yes.

The Court: —about persons confined in punitive segregation.

Mr. Fortunato: Nothing further of this witness, your Honor.

Cross-examination by Mr. Allen

XQ. Warden, under the rules the classification board may classify a prisoner A, B, C, or D. Is that correct? A. That is correct.

The Court: Those are the categories?

Mr. Allen: Those are the categories.

XQ. In order to change the category of a prisoner, what must happen? A. He must be properly notified and appear before the classification board, have a hearing, and have a formal vote taken on downgrading his classification.

[216] XQ. That has nothing to do with—that is not the same thing or has no bearing on a disciplinary hearing,

does it? A. It has no bearing.

XQ. So that a prisoner who is classified B is not necessarily in segregation B or punitive segregation B. Those B's are two different B's, aren't they, or three different B's? A. Yes, there is much confusion.

The Court: There is much confusion?

The Witness: Yes, your Honor.

A. (Continued) And I think it comes down to the traditional years, because formerly they called punitive segregation "segregation B," but with the new set of rules that term has been eliminated and applied to a new category.

XQ. So that segregation B is actually one that— A. It is not punishment; it is a classification.

XQ. That is a classification, and punitive segregation is something that has nothing to do with classification. A. Right.

Mr. Allen: I have nothing further of this witness.

Redirect examination by Mr. Fortunato

Q. To clear this up a little bit, he is in punitive segregation right now. A. Yes.

Q. Prior to November, let's say, 11th, prior to the incident, prior [217] to all the hearings, he was in a category known as A. A. Yes.

The Court: Category A?

The Witness: Yes.

Q. If the classification board were to follow the recommendation of the disciplinary board and downgrade him, he would be put into category B.

Mr. Allen: Object; speculative.

Q. Where can you go down from A? A. To B.

Q. And if he were to be put into B, he would be confined in his cell 23 hours a day.

Mr. Allen: Object.

A. Yes.

Mr. Allen: Move to strike.

The Court: What is the basis of your motion?

Mr. Allen: The witness is testifying now as to what might happen after a disciplinary board might have found that this guy should be reclassified to B, as opposed to C or D or something else. It is wholly speculative.

The Court: Without arriving at any conclusion, it is a fact, is it not, that the board found the plaintiff guilty and ordered his confinement and made a recommendation that reclassification be considered?

Mr. Allen: Yes, your Honor, but it is our contention that [218] no matter what this Captain Baxter's board recommended to a future hearing board, procedural due process is again injected into the subsequent reclassification process. In other words, that recommendation must stand the test of yet another full set of procedural safeguards. So that whatever their recommendation, that procedural due process is fully afforded a man who is sought to be reclassified, as your Honor will see from perusing the rules.

If I may make an analogy, your Honor, it is as if the motorist were complaining that the judge, who fined him $10 or $50 for driving under the influence, was complaining and, besides, he recommended to the Registry that they suspend his license. As your Honor knows, under *Bell* and *Burson*, the Registry has to afford full procedural safeguards to a motorist before they can suspend or revoke his license, so that the judge's classification has to pass through a constitutional screen before it can have any effect.

In that sense the outcome of a future hearing before a reclassification board is wholly speculative and fully protected by constitutional due process.

Mr. Fortunato: Your Honor, I don't think anyone is more qualified than the witness to testify as to what the meaning of the sentence of the disciplinary board means and as to what effect it has within the context of the prison,

and in effect what harm or injury at least we contend as such he faces.

[219] The Court: I don't think the warden is undertaking to testify to that.

Mr. Fortunato: Excuse me?

The Court: I don't think the warden is undertaking to testify to that. We have got to the point where the board rendered a finding of guilty, imposed a sentence, there was an appeal to the warden, and the warden affirmed the decision of the disciplinary board.

Mr. Fortunato: That is correct. Now I am asking him, based upon his knowledge and expertise as warden of the prison, what happens when one is put from category A down into category B.

The Court: Put into category B by whom?

Mr. Fortunato: By the classification board.

The Court: True, but we haven't reached that point.

Mr. Fortunato: We have reached the point where we are agreed that the sentencing tribunal, so to speak, the disciplinary board, is recommending that the classification board—

The Court: —do that very thing.

Mr. Fortunato: —do that very thing: downgrade him. What else can it mean?

The Court: Are we to assume the reclassification board will follow the recommendations of the hearing board?

Mr. Fortunato: Perhaps I can clear it up by a few preliminary questions, your Honor.

[220] Mr. Allen: I think the case is now spreading beyond the limits of the complaint. There is no allegation here the classification board is going to deprive this plaintiff of procedural due process.

Mr. Fortunato: I am withdrawing my question.

The Court: Go ahead. Let's see where we go.

Q. Now directing your attention to Defendants' Exhibit A, the regulations, the Morris regulations, page 11 begins with some bold-faced type and says, "CLASSIFICATION PROCEDURES." Is that correct? A. Yes.

Q. And these are the classification procedures to be followed at the Adult Correctional Institutions? A. Yes.

Q. Following along onto page 12, sentence No. 4 says that

"The findings of the Disciplinary Board as to a particular infraction shall be conclusive."

Mr. Allen: Object.

The Court: What are you reading from?

Mr. Fortunato: No. 4 on page 12.

The Court: What is your objection?

Mr. Allen: Your Honor please, again he is asking questions which are matters of law, which are not covered by any allegation in the complaint, which were not covered on direct examination, and were not covered on cross-examination. He is opening up a [221] whole new challenge in this case. He is now asking this Court to protect him from a future classification board.

I take it there is nothing in the pleadings or in the testimony or the proof which warrants us at this late hour of the day to go into this whole line of questioning.

Mr. Fortunato: Your Honor, on cross-examination counsel went into some discussion about B and the old and the new B, and all this sort of thing. Now on redirect I am trying to clear that up.

Q. Will the disciplinary board—

Mr. Fortunato: Strike that.

Q. Will the classification board reconsider the classification of Mr. Palmigiano in light of the sentence and your upholding it?

Mr. Allen: Object. If he knows.

Q. (Continued) If you know. A. If I know?

Q. Would it be the usual procedure, that you are familiar with at the ACI, for the classification board to consider the recommendation of the disciplinary board and at least consider— A. Ordinarily they will reconsider, yes.

Q. Would they have access to any records made relative to the— A. They have access to the entire record.

Q. Of the disciplinary board? A. Right. But I should add that recommendation is not a mandate upon Classification.

[222] Q. Do you have any connection with the classification board? A. I preside over the classification board.

Mr. Fortunato: Nothing further, your Honor.

Mr. Allen: No further questions, your Honor.

The Court: You may step down, Warden.

Mr. Fortunato: Your Honor, at this time the plaintiff is through with the presentation of his case in chief.

The Court: Very well.

Mr. Fortunato: And if it is appropriate—at this time I would ask leave of the Court at the appropriate time to amend certain of my pleadings to conform to the evidence, pursuant to Rule 15 of the Federal Rules.

Specifically I refer to the fact that we have not alleged any monetary loss. And I don't believe in my request for leave I ask for the record to be expunged. But in light of the fact that the evidence before the Court at this time indicates Mr. Palmigiano suffers pecuniary loss as a result of his confinement, and, also, that the record of these proceedings will follow him to the parole board, to any other in-prison treatment in terms of going into minimum security, or anything like that, I would ask for leave to amend the pleadings to conform at the appropriate time.

Mr. Allen: This case has been answered, your Honor.

The Court: That is true, but it is the policy of the courts to permit liberality in amendments to effect justice.

[223] Mr. Allen: The State would ask for a short recess.

The Court: Very well.

Mr. Allen: Not any substantial recess. We don't anticipate any extensive—

The Court: You may have your recess without exceeding 15 minutes.

Mr. Allen: Thank you, your Honor.

The Court: We will take our customary recess at this point.

(Recess)

Mr. Allen: Your Honor will recall, this morning I tried rather clumsily to explain a sequence of events which were intended and did occur with respect to the Morris Rules becoming law. And your Honor invited me to refer the matter to my brother, Mr. Burke.

Subject to Mr. Burke making a statement on the record as to what the travel of the Morris Rules has been and the effect intended, to the extent your Honor wants to hear that, the State rests; subject to my brother, Mr. Burke's, statement on the record. And I would offer that at this time, your Honor.

The Court: I have no objection to having the benefit of the statement if you think—

Mr. Allen: I think it would be most helpful, your Honor.

The Court: Very well. It is understood by counsel that [224] the remarks of Mr. Burke don't constitute evidence, but they may serve to enlighten the Court on the history of these rules.

Mr. Allen: Your Honor, I think everything Mr. Burke is going to say is a matter of record in the court. In other words, he is describing orders and judgments and opinions that have been rendered in this court and matters of which the Court can take judicial notice, rather than matters of fact which would require to be proven in the ordinary course.

The Court: Very well; go ahead.

Mr. Burke: Your Honor, at the time of the inception of the case, *Morris* v. *Travisono,* which began in October of 1969, I was the counsel of the then Department of Social Welfare, which had within its jurisdiction the Department of Corrections. And I was one of the counsel representing the Department in that case. After protracted hearings in the case the rules and regulations governing disciplinary, classification, and mail procedures for all inmates at the Adult Correctional Institutions were drafted by counsel both for the petitioners and for the State of Rhode Island, and a consent decree was entered by Judge Pettine promulgating these rules. Notice was given to all members of the class who had brought the suit as to the rules, and hearings were held by Judge Pettine at which an opportunity was given to inmates to express their views. In any event these rules were finally promulgated as a decree of the court in that case.

[225] The Court: You mean these rules are incorporated by reference in an order?

Mr. Burke: Yes, they are, your Honor; they are.

However, there was a period of time, your Honor, when I went on to the Department of Mental Health, Retardation, and Hospitals, so I cannot testify firsthand as to what happened over a year and a half. But as of July 1st of this year a new Department of Corrections was established within the State of Rhode Island, and I was appointed as the legal counsel of the Department of Corrections. Judge Pettine had indicated—and indicated by opinions and by orders—that it was not the desire of the Federal Court to maintain permanent jurisdiction over the rules and regulations, but that the rules and regulations should be incorporated into the laws of the State of Rhode Island.

The Court: Incorporated into the laws of the State of Rhode Island?

Mr. Burke: Of the State of Rhode Island. In other words, they should be promulgated as a regulation of the State of Rhode Island in accordance with the Administrative Procedures Act of the State of Rhode Island.

As a result of this, in compliance with the Administrative Procedures Act, public advertisements were placed in the Providence Journal and Evening Bulletin. The proposed rules and regulations, which were identical with the decreed rules and [226] regulations, were placed on file in the office of the Secretary of State.

Within the prescribed period of time some 28 or 29 inmates of the Adult Correctional Institutions requested, as they can under Rhode Island law, that a public hearing be held in relation to the rules and regulations. In compliance with this request two public hearings were held; one open to the general public and inmates of the minimum-maximum, minimum-medium security building on—I believe it was August the 10th of this year, and a transcript was made of those proceedings. And another hearing was held on August 15th in the maximum security building of the Adult Correctional Institutions where the rules and regulations were discussed line by line and where witnesses were allowed to testify, including, as I distinctly recall, Mr. Palmigiano, who did testify and express some objection to certain of the rules.

A copy of the transcript of the hearing was forwarded to the National Prisoners Rights Association at their request, and on October the 10th the director of the Department, Mr. Travisono, having reviewed the transcript, notified the Secretary of State and forwarded a copy of the rules, identical with the copy that you have, that has been admitted in evidence in this case as, I believe, Defendants' Exhibit A, to the Secretary of State, for filing as the rules of the Department.

[227] Under the state law there is a 30-day period thereafter in which any interested party can ask for a concise statement as to why a specific rule has been adopted. There were no such requests.

The Court: When were these actually filed?

Mr. Burke: They were filed on the 10th of October, your Honor,—

The Court: Of this year?

Mr. Burke: Of this year. —as the rules of the Department under the Administrative Procedures Act. That was in final form. They had originally gone up there earlier in the year. Then the notice proceeding went through. But having had the hearings, the Secretary of State was officially notified on the 10th of October that the rules were adopted as the rules of the Department of Corrections governing disciplinary, classification, and mail procedures for all inmates at the Adult Correctional Institutions. Then within the Administrative Procedures Act there is a 30-day period in which any interested person may inquire of the Department as to why a specific rule was adopted. That 30-day period expired on 10 or 11 November. And I have, subsequent to that date,—I believe it was last week —notified Judge Pettine and counsel of record that the rules have been promulgated in accordance with—I notified them by letter that the rules have been promulgated in accordance with the Administrative Procedures Act.

[228] The Court: Your point being then that the rules were in full force and effect on November 11th.

Mr. Burke: Yes, your Honor.

The Court: Is there any dispute about that, Mr. Fortunato?

Mr. Fortunato: I have no way of disputing it, but I would certainly say that Mr. Burke, as an officer of the court, has put forth everything he believes to be correct.

The Court: In other words, the rules and regulations were in effect on November 11, 1972?

Mr. Fortunato: Yes, your Honor.

The Court: And the disciplinary proceedings were to be governed and conducted by and in accordance with those rules.

Mr. Fortunato: Yes, your Honor.

The Court: Very well.

You say that the defendants rest?

Mr. Allen: We rest, your Honor.

The Court: Very well. Are you prepared to argue today or would you prefer to argue on Friday?

Mr. Allen: I would frankly prefer to argue on Friday, your Honor, but—

The Court: If you do, I think it might be well. I want counsel for both sides to direct your inquiry and contentions, among other things, to whether or not there was in fact a compliance by the disciplinary board and authorities at the ACI with the provisions of these rules and regulations.

[229] Mr. Allen: Yes, your Honor.

Mr. Fortunato: Your Honor,—

The Court: Excuse me. It can't be Friday.

Mr. Fortunato: Your Honor, I can represent that as far as the plaintiff is concerned, I am prepared to address myself to that problem as well as—

The Court: We have a jury trial on Monday, Mr. Clerk?

Mr. Fortunato: If counsel is ready, and recognizing—

Mr. Allen: I don't have that much to say, your Honor.

The Court: Perhaps we had better proceed because we will have no session of the court on Friday. Tomorrow is a holiday. We certainly will have no session tomorrow.

Mr. Allen: If I might have just a moment, your Honor, to shuffle—

The Court: Take your time. We don't mean to hurry you or deny you an opportunity to be heard.

Mr. Fortunato: Your Honor please, I understand the Court's practice is to not go past 4:30. Shall we divide the time equally then?

The Court: I think you should.

Mr. Allen: I shan't require that long, I don't think.

(Arguments of counsel)

The Court: The Court will adjourn.

(Adjourned at 4:45 p.m.)

I hereby certify that the foregoing 229 pages are a true and accurate transcript according to my stenographic notes.

(s) Eunice J. Archambault
Official court reporter.

District Court of the United States
For the District of Rhode Island

Civil Action No. 5053
Nicholas A. Palmigiano
v.
Joseph Baxter Et Al.

OPINION
December 15, 1972

Day, District Judge. In this action the plaintiff seeks a declaratory judgment, injunctive relief and damages against the defendants. The jurisdiction of this Court is invoked under the provisions of 4 U.S.C. § 1983 and 28 U.S.C. § 1343.

Plaintiff is a prisoner confined in the Rhode Island Correctional Institutions, at Howard, Rhode Island, and is serving a life sentence for murder imposed upon him on September 14, 1970. He is the President of the National

Prisoners Reform Association which by permission of the state authorities has a local office in said Institutions' facilities. The defendants, Captain Joseph Baxter, Norman Carney and Mitchell Siner, are correctional officers in said Institutions, and the defendants Francis Howard and Roland P. Remillard are, respectively, the Warden and Deputy Warden thereof.

In a lengthy complaint, a summary of which would unduly and needlessly extend this opinion, the plaintiff alleges in substance that on or about November 11, 1972, he was charged with a violation of prison discipline, specifically, "inciting a disturbance and disruption of A.C.I. operations, which might have resulted in a riot . . ."; that on November 13, 1972, the defendants Baxter, Carney and Siner, sitting as a disciplinary hearing board, summoned plaintiff to appear before them to answer to said charge; that he appeared before them with his attorney, Stephen J. Fortunato, Esq.; that he was advised by them that his attorney would not be permitted to represent him during said hearing, and that he, the plaintiff, remained mute: that said defendants, sitting as said Disciplinary Board, did not hear or consider any evidence for or against him and found him guilty of said charge and sentenced him to thirty (30) days in the Behavioral Correctional Unit (segregation), and recommended that he be down-graded in classification at the end of such sentence, and that he lose any and all good time credits, all in violation of his constitutional rights.

He seeks a declaratory judgment —

(1) that the action of the members of said Board, in refusing him the assistance of counsel during said hearing, was in derogation of his constitutional rights under the Fifth, Sixth and Fourteenth Amendment rights,

(2) that its decision was null and void on the ground that no evidence was produced against him,
(3) that the procedure followed by said Board, namely, the drawing of adverse inferences from his refusal to make any statements to be in derogation of the Fifth and Fourteenth Amendments to the United States Constitution, and
(4) that the convening of any disciplinary hearing, based upon facts from which a criminal prosecution could be brought, is unconstitutional unless and until any criminal charge is disposed or until the plaintiff is guaranteed by appropriate officials that no criminal charge will be placed against him arising out of any incidents that also constitute an alleged violation of prison regulations.

Plaintiff also seeks a permanent injunction enjoining the defendants from convening a disciplinary hearing and from punishing the plaintiff until the plaintiff is assured that no criminal charge will be brought against him arising out of said incident that occurred on November 11, 1972.

Additionally, he seeks an order directing the defendants "to expunge from the plaintiff's record all findings, decisions, and descriptions of any kind pertaining to the events and happenings complained of herein", and an award of compensatory damages of One Hunderd Dollars ($100) for every day he has spent in punitive segregation, the costs of this proceeding, plus a reasonable attorney's fees.

The testimony and evidence presented during the trial of this action establish the foilowing facts. During the early evening of November 11, 1972, another prisoner, confined in the same wing of said Institutions as the plaintiff, became violently ill; efforts by the guards to provide medical attention for him had proved unsuccessful up to 8:50 o'clock P.M. when plaintiff was observed urging other

prisoners not to return to their cells at 9:00 o'clock P.M., when the buzzer sounded, as required by the regulations, in protest against the failure to provide such medical attention. Some of the prisoners responded to his urgings and did not return to their cells until 9:10 o'clock P.M. when such medical attention was provided.

The evidence further shows that Lutehr Gorton, a guard, who had observed plaintiff's activities, decided that he should report plaintiff's misconduct to his superior, Captain Brule. Before preparing his report to his superior, he went to the plaintiff's cell and advised him that he was going to report his violation of regulations to Captain Brule. He then prepared and submitted to Captain Brule such a report charging the plaintiff with infraction of the Rules, to wit, "Inciting a disturbance and disruption of A.C.I. operations which might have resulted in a riot. At 8:50 P.M., and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other inmates and telling them not to go to the cells, when the buzzer sounds at 9: P.M."

After receipt of said report Captain Brule went to plaintiff's cell and read to the plaintiff said report. After his interview with the plaintiff, Captain Brule prepared his investigative report which reads as follows:

"November 11, 1972. Superior's Investigation. Inmate denies infraction as written: he says the reason he came to the Rear Hall to see me was that I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M. He says the reason no one went to their cells was that I had not and would not do my job until pressured. Inmate Palmigiano says he is not sorry and would take similar action again if necessary.

Inmate Palmigiano was informed to contact his lawyer as he may be prosecuted for a violation of state law.

Inmate Palmigiano Tagged and Fed-in. He definitely appears to be a threat to the security and order of the Institutions."

The evidence further establishes that copies of said disciplinary report and said investigative report were delivered the next morning to Robert Flint of said National Prisoners Reform Association to which by agreement with Warden Howard all reports of infractions of the rules and regulations by inmates were to be referred. Under the regulations governing disciplinary procedures in effect on November 11, 1972, the Morris rules so-called,[1] any inmate had the right to be assisted at a disciplinary hearing by a classification officer or any other individual authorized by the Warden and Assistant Director for Correctional Services. Prior to November 11, 1972, the said Robert Flint had been authorized to assist inmates at such disciplinary hearings.

Plaintiff testified that on November 12, 1972, Robert Flint, to whom copies of said disciplinary and investigative reports had been given, showed them to him. He stated that on said date he conferred with his personal attorney and several other attorneys, having been advised that he would be granted a hearing on the infractions charged to him on the afternoon of November 13, 1972.

Said hearing was held in the office of Deputy Warden Remillard, convening at approximately 2:15 o'clock P.M. on November 13, 1972. At the request of the plaintiff and as permitted by said regulations, a tape recording of what transpired thereat was made by Robert Flint and at the completion of said hearing was delivered by him to Mr. Siner. The testimony of the plaintiff and Captain Bax-

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[1] These rules were approved in *Morris* v. *Travisono*, 310 F. Supp. 857 (D.C. R.I. 1970) and were promulgated by the Assistant Director For Correctional Services of the State of Rhode Island on February 9, 1970.

ter and the contents of said tape recording establish beyond a reasonable doubt what transpired at said hearing. At the outset thereof plaintiff entered said hearing room with his attorney who stated that he was there to represent the plaintiff during said hearing on the charge of infraction of the rules which had been made against him. He was advised by Captain Baxter that, under said rules and regulations, an inmate charged with an infraction thereof was not permitted to be represented by counsel at a disciplinary hearing. Plaintiff's counsel strongly protested this ruling and then he and plaintiff left said hearing room. Shortly thereafter plaintiff and Robert Flint returned to said hearing room. The taped record of said hearing recites that Captain Baxter then read to the plaintiff said disciplinary report and the investigative report of Captain Brule. He then addressed the plaintiff as follows: "What happened here, Nick?" Before any reply was made by the plaintiff, Robert Flint addressed said Board protesting that the plaintiff was entitled to be represented by his counsel during said hearing. Plaintiff then replied to the inquiry of Captain Baxter by stating: "At this time I have to take my attorney's advice and remain mute. I would also reask if my attorney could be present." Captain Baxter then replied: "Disciplinary boards are disciplinary boards. They are not court (?) of law. You have been offered a postponement. You have refused it. We do not have as an institutional policy attorneys sitting in on disciplinary hearings. Your request is denied." Flint then reiterated his and plaintiff's objection to proceeding with said hearing without the plaintiff being represented by counsel. Captain Baxter then again denied the request of the plaintiff that he be permitted representation by his attorney during said hearing. After this ruling, he addressed the plaintiff as follows: "Do you intend to answer any questions for the Board?" The latter's reply was "No".

The record further shows that plaintiff and Flint, at the request of said Board, then left the hearing room. Approximately five (5) minutes later they re-entered said room at the request of said Board. Captain Baxter then read the decision of said Board which was as follows:

> "The Board finds the defendant guilty. He stood mute and did not call any witnesses. The Board has no alternative but to go on the disciplinary report — what is written on the disciplinary report. The sentence is 30 days' segregation B, 30 days' loss of good time; the Board recommends that Nick Palmigiano be seen by the classification board for possible down grading."

He then asked the plaintiff if he wished to appeal said sentence. Flint replied as follows: "We do appeal the entire action of this Board today; most strongly object to the Board's deliberations and this disciplinary action — alleged disciplinary action being taken, most strenuously voice objection to it. And we do appeal to any existing authorities within the State of Rhode Island insofar as the action of this Board is concerned today."

The record in this action shows that said appeal was noted and that said Board's findings and decision were forwarded on November 13, 1972 to the defendant Warden Howard for review in accordance with said rules and regulations. After a review of said records and an interview with the plaintiff on November 14, 1972, Warden Howard denied said appeal and the plaintiff was then committed to said Behavioral Correctional Unit to serve said sentence.

Plaintiff, during his testimony before this Court, testified that he was familiar with said Morris Rules, so-called, and that he objected to some of them at the time of their approval. He also admitted that he did not request that any witnesses be called before said Board to testify in his

behalf, although he knew that he had such a right under said rules. During his testimony he did not state or claim that he was innocent of the charge that had been preferred against him and of which said Disciplinary Board had found him to be guilty.

It is well settled that in a disciplinary procedure, such as that involved herein, typical trial procedures employed in a criminal trial are not required. On the other hand, prison officials may not be arbitrary or capricious in imposing punishment upon inmates for violations of prison rules and regulations governing their conduct while incarcerated. Disciplinary action must be premised upon facts rationally determined. *United States Ex Rel Walker* v. *Mancusi*, 467 F.2d 51 (2d Cir. 1972); *Tyree* v. *Fitzpatrick*, 325 F. Supp. 554 (D.C. Mass. 1971), *affirmed* 445 F.2d 627 (1 Cir. 1971); *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972); *Nolan* v. *Scafati*, 430 F.2d 548 (1 Cir. 1970); *Brenneman* v. *Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *Mertz* v. *Pinto*, 343 F. Supp. 374 (D.C. N.J. 1971); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D.C. N.J. 1971).

In *Sostre* v. *McGinnis, supra*, the Court of Appeals said at Page 198:

> ". . . In rejecting Judge Motley's conclusions, however, we are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials. If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, see Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L.Ed.2d 62 (1965); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950), and afforded a reasonable opportunity to explain his actions."

Similarly, in *Nolan* v. *Scafati, supra*, the Court of Appeals said at page 550:

> ". . . While the procedural safeguards provided citizens charged with a crime obviously cannot be provided to prisoners charged with violation of a disciplinary rule, some assurances of elemental fairness are essential when substantial individual interests are at stake."

It is well settled that in a hearing before disciplinary boards procedural due process does not require that a prisoner be permitted to be represented by counsel during such hearing. *Sostre* v. *McGinnis, supra; Braxton* v. *Carlson*, 340 F. Supp. 999 (N.D. Pa. 1972); *Urbano* v. *McCorkle, supra; Nolan* v. *Scafati*, 306 F. Supp. 1 (D.C. Mass. 1969).

The evidence in this action establishes beyond any doubt that the plaintiff discussed the charge filed against him with his legal counsel prior to said hearing and that he was, in fact, represented during said hearing by the said Robert Flint, although the plaintiff testified to the contrary.

After a careful consideration of all of the evidence and the reasonable inferences to be drawn from it, I am satisfied that procedural due process was accorded to the plaintiff in said disciplinary proceeding. He was fully advised prior to said hearing of the infraction of the rules by being shown copies of said disciplinary report and said investigative report by Robert Flint to whom they had been delivered on November 12, 1972. He then conferred with

his legal counsel with respect thereto. At the opening of said hearing on November 13, 1972, the contents of said reports were read verbatim to him and he was given the opportunity to explain his actions as narrated therein. He rejected this opportunity by stating that he intended to remain mute and that he would not answer any questions addressed to him by said Board. This was a deliberate decision made by him after being confronted with the accusation made against him, and after having been informed of the evidence against him.

Finding, as I do, that the plaintiff was accorded procedural due process by said Disciplinary Board and that its decision was based on facts rationally determined, it follows that the plaintiff is not entitled to the injunctive and other relief which he seeks in this action. Accordingly, judgment will be entered for the defendants.

(s) Edward W. Day
District Judge

United States District Court
For the District of Rhode Island

C.A. No. 5053

Nicholas A. Palmigiano
v.
Joseph Baxter, et al.

JUDGMENT

This matter came on for hearing on preliminary injunction, and by agreement of the parties the hearing consolidated with the hearing on the merits. After the taking of testimony, argument of counsel and consideration thereof I find:

(1) That the defendants premised the discipline imposed on plaintiff upon substantial facts rationally determined;

(2) That plaintiff did not state or claim before this court that he was innocent of the charges of which the disciplinary board found him guilty;

(3) That procedural due process was accorded the plaintiff in the disciplinary proceeding;

(4) That plaintiff waived his opportunity to explain his actions to the disciplinary board.

I conclude:

(a) That the defendants did not deny the plaintiff of any of the rights as alleged in the complaint.

(b) That plaintiff was not entitled either under the Morris rules or otherwise to be represented before the disciplinary board by an attorney at law.

Wherefore, it is

Ordered, Adjudged and Decreed

that plaintiffs demand for injunctive relief is denied. Further, plaintiffs prayers to expunge and for damages are denied; judgment for defendants on all prayers for relief.

Dated at Providence this 27th day of December, 1972.

Enter:

(s) Edward W. Day
United States District Judge

December 27, 1972

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

PLAINTIFF'S MOTION FOR RECONSIDERATION

The Plaintiff hereby moves the Court pursuant to Rule 59 of the Federal Rules of Civil Procedure to reconsider its decision and alter or amend judgment in the above-entitled case, rendered on December 15, 1972. Specifically, the

plaintiff requests the Court to reconsider the following issues:

1. Whether by interrogating the plaintiff at the disciplinary hearing in question and penalizing him for his failure to testify where he had been informed that he may be prosecuted under state law for the same charge and had not been assured that his testimony could not be used to incriminate him, the defendants deprived the plaintiff of his rights under the Fifth and Fourteenth Amendments to the United States Constitution;

2. Whether by failing to permit the plaintiff to be represented by an attorney at his disciplinary hearing where he was interrogated by the defendants, penalized/for his failure to testify; and where he had been previously informed that he may be prosecuted under state law for the same charge but had not been assured that his testimony could not be used to incriminate him in a state criminal proceeding, the defendants deprived the plaintiff of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Wherefore plaintiff prays that the Court reconsider its decision of December 15, 1972 and alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure in light of the above-stated issues or in the alternative rule that these issues have not been adjudicated in this case.

Respectfully submitted,
(s) Ellen Wilbur Katz
Ellen Wilbur Katz
National Prisoners'
Reform Association
135 Dodge Street
Providence, Rhode Island

[Certificate of Service Omitted in Printing]

To: W. Slater Allen, Esquire
Attorney for Defendants
250 Benefit Street
Providence, Rhode Island

Please take notice, that the undersigned will bring on the within motion for hearing before this Court, United States District Court, Federal Building, Providence, Rhode Island on the fifteenth day of January, 1973, at 10 o'clock a.m. of that day or as soon thereafter as counsel can be heard.

(s) Ellen Wilbur Katz
Ellen Wilbur Katz
Attorney for Plaintiff
National Prisoners' Reform Assoc.
135 Dodge Street
Providence, Rhode Island 02907

United States District Court
For the District of Rhode Island

Nicholas A. Palmigiano
v.
Joseph Baxter, et al.

OPINION
January 19, 1973

Day, *District Judge*. In this action the plaintiff now seeks a reconsideration by me of the conclusions set forth in my opinion filed in this action on December 15, 1973, and the amendment of the judgment entered in accordance therewith on December 27, 1972.

In my opinion said motion for reconsideration and amendment presents no valid grounds for the relief sought therein. The authorities upon which the plaintiff relies in sup-

port of his motion are clearly distinguishable on their facts from this case. Accordingly, said motion must be and it is denied.

(s) Edward W. Day
District Judge

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

ORDER

This matter came on to be heard on plaintiff's motion requesting the court to reconsider its conclusions of law in a prior opinion and judgment. After consideration thereof, I conclude that plaintiff's motion presents no valid grounds for relief and it is

Ordered

plaintiff's motion is denied.

Dated at Providence this 26 day of January, 1973.

Enter:

(s) Edward W. Day
United States District Judge

United States District Court
For the District of Rhode Island

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Nicholas A. Palmigiano, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final judg-

ment entered in this action on the 27 day of December 1972, and from order entered on the 26 day of January, 1973, denying plaintiff's Motion to Reconsider and Alter or Amend Judgment.

(s) Ellen Wilbur Katz
Ellen Wilbur Katz
Attorney for
Nicholas A. Palmigiano
135 Dodge Street
Providence, Rhode Island

Copy to: 1. Deputy Warden 2. Inmate

ADULT CORRECTIONAL INSTITUTIONS

DATE 11/13/72 INMATE DISCIPLINARY REPORT

Date Nov. 11, 1972

Time of infraction 8:50 P.M.

Inmate's Name Nicholas Palmigiano D.O.B. May 30 1923

Quarters Assignment G-8 Work Assignment Barber Shop

Infraction of Rules by Inmate: (Give a Detailed Account) inciting a disturbance and disrupt of ACI operations, which might have resulted in a riot, at 8:50 P.M. , and from then until about 9:05 P.M., I saw, and heard inmate Palmigiano going among the other inmates and telling them not to go to the cells, when the buzzer sounds at 9:00 P.M.

Inmate's Attitude: Poor and demanding

What Course of Action Was Taken Immediately Following Infraction? Notified Capt. Brule

Reporting Officer's Signature

Was Inmate Forewarned Before Disciplinary Action Was Taken? Yes, by Capt. Brule.

Did Other Institutional Personnel Witness The Infraction? (Give Names) No

Did Superior Officer Orally Inform Inmate of Infraction? Yes Capt. Brule

Superior Officer's Investigation: ~~(see attached reports)~~

Superior Officer's Signature

DISPOSITION OF CASE BY DISCIPLINARY BOARD

Counselor's Name [illegible] Date 13 Nov 72

[illegible]

ACI-47

BEST COPY AVAILABLE

November 11, 1972

Superior's investigation

Inmate denies infraction as written, he says the reason he came to the Rear Hall to see me was that I had been informed by other inmates earlier in the evening of an inmate, James Madden, being sick and that I had taken no action by 8:45 P.M. He says the reason no one went to their cells was that I had not and would not do my job, until pressured. Inmate Palmigiano says he is not sorry and would take similar action again if necessary.

Inmate Palmigiano was informed to contact his lawyer as he may be prosecuted for a violation of state law.

Inmate Palmigiano ordered Tagged and Fed-in. He definitely appears to be a threat to the security and order of the Institution.

(s) Ronald R. Brule
Capt. Ronald Brule

STATE OF RHODE ISLAND
INTER-DEPARTMENTAL COMMUNICATION

Nov. 11, 1972

To: Roland Remillard, Deputy Warden
Dept.: Maximum Security
From: Capt. Ronald Brule
Dept.: Maximum Security
Subject: Refusal of inmates to go to cells for 9:00 P.M. count.

Sir,

At approximately 8:20 P.M. on the above date, Officer Gorton called and informed me that inmate James Madden appeared to be sick in his cell. I immediately went in and saw Madden bent over on his bed complaining of pains in his abdomen and right side. He also said that he felt like vomiting but that nothing came up. He had the same symptoms approximately two weeks earlier, when he was admitted for tests at the R.I.M.C.

At 8:25 P.M. I called the Supervisor of Nurses at 'H' Bldg. and explained the situation. She told me she would contact the doctor and return my call.

At 8:30, inmate Alfredo Pelleccia came to the Rear Hall and told me I had better get Madden to a doctor, "he might be having a heart attack". I told inmate Pelleccia that I had already called the R.I.M.C. and the doctor was going to call me back. He then demanded that I not wait for the doctor's call and that I send the man to the Medical Center immediately.

At approximately 8:45 P.M. inmate Nicholas Palmigiano came to the Rear Hall door and also demanded that I immediately take Madden to the hospital. I told inmate Palmigiano that I was still waiting for the doctor. He again demanded that I call the Warden and to take the man to R.I. Hospital.

At 8:50, inmate Palmigiano again came to the Rear Hall door and said that the population was not going to go to their cells unless I took Madden to the hospital. I again told inmate Palmigiano that I was doing everything possible for Madden. I also checked inmate Madden again and told him what was being done for him. I then informed you of the situation, and told Officer Bonn to call Lt. Detonnancourt and inform him. Officer Bonn tried but couldn't reach him at 9:00 P.M. due to the lockup going on in the Lower South Area.

At 9:00 p.m. the inmates of GHI and JFL Blocks, refused to go to their cells. I again told inmate Palmigiano I was doing everything possible for inmate Madden and that refusing to go to cells was very serious.

Shortly thereafter Lt. Detonnancourt came to the rear hall and said we should get Madden out of his cell immediately due to the situation. I again went to Madden's cell and was told by inmates there that Madden was spitting blood. Officer Bonn and I brought Madden to the Rear Hall and again called the Nursing Supervisor who told me that the Doctor had just arrived and to send the inmate to the H Bldg. clinic which I did immediately which was approximately 9:10 P.M.

At 9:15 P.M. all the protesting inmates were in their cells. At 9:30 P.M. Officer Fagnant called from H bldg. and informed me that the doctor had said that there was nothing physically wrong with inmate Madden. Upon his return from the R.I.M.C., I placed Madden in hosp. N 4 for observation on request of the Doctor.

Respectfully,
(s) RONALD BRULE
RONALD BRULE, Capt.

STATE OF RHODE ISLAND
INTER-DEPARTMENTAL COMMUNICATION

November 11, 1972

To: Ronald R. Brule, Captain
Dept.: Maximum Custody
From: James Gould, Corr. Officer
Dept.: Maximum Security
Subject:

At approximately 8:50 p.m. on this date, I observed inmate Alfredo Pelleccia going around informing inmates that they were not to go into their cells at the 9:00 p.m. lock-up, until inmate James Madden was taken to the hospital. At 9:00 p.m. when the buzzer sounded for the lock-up, many inmates didn't go into their cells.

(s) JAMES R. GOULD
JAMES R. GOULD, Corr. Officer

DISCIPLINARY PROCEDURES*

PROCEDURAL OUTLINE FOR DISCIPLINARY ACTION

Five Mandatory Steps:

1. Written charge by reporting officer or employee
2. Investigation and review by superior officer
3. Hearing before Disciplinary Board
4. Administrative review
5. Record

I. CHARGE BY REPORTING OFFICER OR EMPLOYEE

A. An officer or employee observing minor violations should handle such incident tactfully and firmly by warning and counseling.

1. If the officer or employee considers the imposition of discipline necessary for a minor offense, he may at his discretion present the inmate with the option of a written charge and subsequent appearance before a Disciplinary Board, or administrative loss of institutional privileges for a period of up to two nights.

(a) The charge and choice of disposition must be presented to the inmate with dispatch.

(b) The inmate must execute a signed waiver of his right to appear before the Disciplinary Board.

(c) If such waiver is obtained, the administrative penalty must commence immediately.

(d) Records of all such two night losses of institutional privileges shall be maintained for one calendar year, then shall be destroyed.

(e) The inmate shall be given a copy of any waiver of a right to the Disciplinary Hearing he executes and records of any punishment resulting therefrom.

(f) Refusal by an inmate to waive his rights to

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* NOTE: The entire text of the "Morris Rules" is set out in *Morris* v. *Travisono*, 310 F. Supp. 857, 865-75 (D.R.I. 1970).

be granted a Disciplinary Hearing can in no way be held against him. Following demand for a Disciplinary Hearing on a minor violation, the inmate may not be confined to his cell pending said hearing as a threat to the order or safety of the institution. If the inmate is subsequently found guilty by the Disciplinary Board, punishment may not be imposed beyond the two night loss of institutional privileges, unless additional sufficient rationale is found by the Disciplinary Board.

2. The inmate may be presented the aforementioned choice of loss of institutional privileges only once during each calendar week. The written notice of choice shall inform the inmate that additional minor violations during that period shall require a Disciplinary Hearing.

3. A written copy of the charge, or if waiver is obtained, the signed waiver, shall be transmitted with dispatch by the correctional officer to the superior officer on duty at the time. Upon receipt of same, the superior officer may, if he considers the violation too minor to warrant imposition of discipline, dismiss the charges and/or release the inmate from confinement in his cell.

B. When an employee or officer considers a written charge and full disciplinary procedures necessary for proper discipline and control, he must show in writing on an inmate violation report form: inmate's name, housing work assignment, if applicable; time, date, place and charge; give known details concerning the alleged violation, and sign the report.

C. An officer may take immediate custody of an inmate being charged with a disciplinary infraction, if such action is deemed by the officer to be necessary to avoid assault or serious disorder. However, only a superior officer may determine that an inmate should be held pending further investigation or hearing by a disciplinary board. Such

detention should take place only when it appears that the inmate represents a threat to himself, to others, or to the security or order of the institution. The superior officer determining that detention prior to an investigation and hearing is necessary must make a written report, and his decision is subject to review by the Warden, Assistant Warden or Deputy Warden as soon as possible. Such detention should only last as long as the circumstances requiring it remain in effect and in no event should an inmate be detained without a hearing beyond the next meeting of the disciplinary board. If an inmate is locked up pending an investigation and disciplinary hearing, such detention must not be in the punitive segregation area unless the security or safety of the institution so requires.

II. Investigation by a Superior Officer

A. The reporting officer or employee must submit a written report of a charge to a superior officer as soon as possible after the alleged violation occurs.

B. A superior officer shall with dispatch and under any circumstances no later than one day after filing the charge, orally inform the inmate of the charge against him.

C. The superior officer shall conduct a preliminary investigation of the matter without unnecessary delay. The investigation will include interviews with the reporting employee, the inmate charged and any other employee or inmates indicated.

D. The superior officer shall make a written summary of his investigation including the results of his interviews and a notation of notice to the inmate. He shall sign and submit the full report to the Deputy Warden of the facility in which the infraction occurs. A copy of the disciplinary report filed by the superior officer should be given to the inmate prior to any disciplinary hearing together with the notice required in subsection F *infra*.

E. The Deputy Warden may either dismiss the charge or transmit notice of the hearing to the senior classification counselor, who shall in turn assign responsibility for the notice and subsequent procedures to a classification counselor. Said notice shall be timely and shall include the date and time of the hearing, the charge, including institutional rule violated, reference to the time, place and other persons involved, if any; and the notice of the right to assistance by a classification officer, and the right to appeal to the Warden or Acting Warden any unfavorable disposition by the disciplinary board.

F. The assigned classification officer will provide the inmate with a copy of the notice he has received concerning the hearing Notice of the hearing must be transmitted to the inmate in a sufficient period of time prior to the hearing to give the inmate an opportunity to prepare a defense.

G. Any inmate being charged shall have the right to be assisted at the disciplinary hearing by a classification officer or any other individual authorized by the Warden and Assistant Director for Correctional Services. The inmate shall be informed of this right as part of the notice provided of the hearing itself.

H. Only a duly authorized Disciplinary Board has power to issue punishment to inmates, including those in the Behavioral Correctional Unit, except as indicated in Section I, paragraph A(1) above.

I. Whenever an inmate is charged with an institutional violation which may be the subject of criminal prosecution, the written notice referred to in paragraphs E and F above shall so notify the inmate, and advise him that although statements he makes in his defense at a disciplinary hearing are probably not admissible for affirmative use by the prosecution at a trial, he may wish to consult an attorney to determine what action to take.

III. The Hearing Before the Disciplinary Board.

A. The Disciplinary Board shall consist of three members, The Deputy Warden or, in his absence, a Superior Officer of the facility in which the alleged infraction occurred shall be the chairman. The two remaining members shall be personnel from the custody and treatment departments respectively. The disciplinary board shall meet at least twice during each calendar week, at least three days apart.

B. Any officer or employee who initiates a violation report or who investigates and reviews the initiating officer's report is not eligible to sit on the Disciplinary Board to hear that case.

C. The hearing shall be conducted in the following manner:

1. The circumstances of the charge will be read and fully explained by the Chairman of the Board.

2. The inmate shall admit or deny the charges.

3. The board members may interrogate the inmate and others as necessary. All interrogation will take place in the presence of the inmate, except where the Board determines that an informant's identity must be protected. In those cases the Board shall make such a determination in the record and indicate the nature of the informant's testimony.

4. If the inmate thinks the charge against him is untrue (in whole or in part), he may present information available to him and others. Said presentation shall include the right to call a reasonable number of witnesses, both diverse and favorable and examine said witnesses.

5. If the inmate has requested the assistance of a classification counselor or other individual approved by the Warden and Assistant Director for Correctional Services, said person shall assist him in the presentation of the case.

6. Upon completion of the hearing, the Disciplinary Board shall take the matter under advisement.

7. After decision is reached by the Board, the inmate shall be called before the Board to hear the decision and to be advised of its rationale and consequences.

8. A board decision must be based upon substantial evidence.

9. In the event of an unfavorable disposition, the inmate will be informed of his right to appeal the decision of the Disciplinary Board to the Warden or Acting Warden. It is to be made clear to the inmate that with respect to any appeal he may request assistance from his classification counselor or other individuals approved by the Warden and Assistant Director for Correctional Services in framing what he believes is wrong with the decision. The inmate shall be allowed to have his objection, if any, incorporated in the case record submitted for review.

10. Any inmate appearing before a disciplinary board may upon request have a recording made of the hearing provided that the equipment for said recording must be furnished by the inmate and that said recordings are to be impounded except for purposes of administrative or judicial review.

Actions Taken by a Disciplinary Board may be as follows:

1. Dismissal of charge
2. Reprimand
3. Recommendations to classification board for change of status.
4. Temporary loss of specified privileges within inmate classification not to exceed thirty days.
5. One to thirty days placement in punitive segregation.
6. 5 above plus referral to classification board with recommendation of reclassification.

7. Loss of good time as prescribed by law under §13-2-44 of the General Laws.
8. Any combination of 3 through 7 above and/or suspended action on any or all of 3 through 7 above.

IV. Review

A. Within three days of the Disciplinary Board decision (Sundays and holidays excluded) if an inmate requests an appeal of a decision of the disciplinary board, the record of any proceedings shall be forwarded to the Warden or Acting Warden. This review shall be completed and the inmate notified of the decision on review within one week. Disposition shall be suspended during this period.

B. If the Warden or Acting Warden is in agreement with the Disciplinary Board decision, the decision is approved and ordered.

C. If the Warden or Acting Warden does not agree with the Disciplinary Board decision, he may order further proceedings or he may reduce or suspend any result of a Disciplinary Board hearing unfavorable to the inmate.

D. The inmate will be notified of any change resulting from the review process.

Whenever individuals are named in their position of authority, it is permissible in their absence for their lawful substitutes to replace them.

V. The Disciplinary Record.

A. A record shall be maintained of all disciplinary proceedings including review by the Warden or Acting Warden.

B. The disciplinary record shall include:

1. A summary of all information produced at the hearing including:

(a) testimony of all witnesses

(b) the written summary investigation report referred to in II(D) above.

(c) The nature of the testimony of any unidentified informant.

2. Physical evidence viewed.

3. Findings of fact and the supporting reasons for the disposition decided upon.

4. Rationale for change in disposition upon review by Warden or Acting Warden.

C. A complete record of all disciplinary proceedings shall be maintained in the inmate's permanent file. If the right to be granted a hearing for a minor violation is exercised, the disciplinary record must indicate: (1) that the option of loss of institutional privileges for one of two nights has been tendered and refused; (2) if disposition in excess of the aforementioned two days period is meted out, the supporting explanation must be included on the record. If the right to a Disciplinary Hearing is waived, the violation shall in no way appear on the inmate's record or upon any record placed before the Parole Board or Classification Board. Records of all such minor violations for which the right to a Disciplinary Hearing is waived shall be maintained for one year, and a copy shall be given to the inmate when the penalty is imposed.

D. Substantial Evidence. A determination of the Disciplinary Board must be based upon substantial evidence manifested in the record of the disciplinary proceedings.

E. If any of the facts establish that the Board made a determination based upon information obtained from an unidentified informant, then the record must (1) contain some factual information from which the Board can reasonably conclude that the informant was credible and his information reliable, including independent corroborating material and (2) establish that the informant spoke with personal knowledge of the matters contained in such statement.

PUNISHABLE CONDUCT

Inmates will be subject to disciplinary action if found guilty of the following:

(a) Disobeying a lawful order of the Department Director, Assistant Director, Warden, Assistant Warden, or any officer or employee of the institution, or of any written prison rule;

(b) Escape from the institution or custody of the institutional personnel or attempt to escape including any attempt to tamper with security devices, possession of articles for such tampering or hiding in an unauthorized area;

(c) Disregard, neglect or refusal to work without valid reason;

(d) Swearing, cursing, or use of any other vulgar, abusive, insolent, threatening or any other improper language toward any other inmates, officer, or person visiting the institution or indecency in language, action or gesture at any time;

(e) Committing of any assault or battery whatsoever on employees, inmates or any person;

(f) Leaving of cell or place of assignment or other appointed place without permission;

(g) Wilfully disfiguring, damaging or destroying any part of the institution, or any materials, tools or machinery;

(h) Committing of any overt mutinous act, inciting riot and/or general disturbance in any part of the institution or on any work assignment;

(i) Being intoxicated (by homemade intoxicants or purchased intoxicants) or under the influence of any kind of alcohol, drug, barbiturates, and/or amphetamines not prescribed by an institutional medical or psychiatric physician or possession of same;

(j) Making or having possession of any type of dangerous weapon or facsimile;

(k) Failing to report to any required destination without authorized permission or valid reason;

(l) Possession of currency, coin or paper, without authorization;

(m) Forging or altering an Institutional Pass;

(n) Making or attempting to make credit contracts in any form without authorization;

(o) Giving false information to an officer or employee of the institution;

(p) Passing or receiving contraband from another inmate, visitor and/or employee regardless of the place of occurrence;

(q) Gambling of any type;

(r) Possession of a syringe and/or needle or similar device;

(s) Possession of controlled medication without prescription and authorization from an institutional medical official;

(t) Fraudulent requests of any type, i.e., check requests, commissary orders, etc., to circumvent established rules, regulations and procedures for the same;

(u) Stealing and/or unauthorized possession of state property or any property;

(v) Making unauthorized telephone calls;

(w) Refusal to submit to required examination after superior officer has determined inmate is under the influence of a narcotic and/or alcoholic stimulant;

(x) Any conduct constituting a crime under the ordinances of cities and towns and/or state or federal laws. Such conduct may subject the offender to prosecution in additional to institutional punishment.

United States Court of Appeals

For the First Circuit

[reported at 487 F. 2d 1280]

No. 73-1088

NICHOLAS A. PALMIGIANO,

APPELLANT,

v.

JOSEPH BAXTER, et al.,

APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before COFFIN, *Chief Judge*,
KILKENNY* and MCENTEE, *Circuit Judges*.

Stephen J. Fortunato, Jr., with whom *McKinnon and Fortunato* and *Ellen Katz* were on brief, for appellant.

Cary J. Coen, John M. Roney, Max Stern, Stern & Shapiro, and *Stanley A. Bass* on brief for Robert Flint and Michael Roberts, Amici Curiae.

W. Slater Allen, Jr., Assistant Attorney General, with whom *Richard J. Israel*, Attorney General was on brief, for appellee.

November 16, 1973

COFFIN, *Chief Judge*. This is an action seeking damages and declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) to redress certain alleged deprivations of procedural due process in the administration of discipline at Rhode Island's Adult Correctional Institutions (A.C.I.). Appellant is a prisoner at the A.C.I. serving a life sentence for murder. In the early evening of November 11, 1972, a fellow prisoner became violently

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* Of the Ninth Circuit, sitting by designation

ill. When by 8:50 p.m. no medical assistance had yet been provided, appellant allegedly advised other prisoners not to return to their cells for the 9:00 lock-up, in protest against the failure to provide medical attention.

Appellant was charged with "inciting a disturbance and disrupt [sic] of A.C.I. operations, which might have resulted in a riot", and summoned before a prison disciplinary board. He was informed that he might be prosecuted for a violation of state law, and that he should consult his attorney. However, his attorney was not permitted to accompany him into the prison disciplinary hearing. Just before the hearing commenced, appellant was advised by the Deputy Warden that his silence would be held against him. Even so, appellant remained silent through the hearing. The disciplinary board based its decision entirely upon the written statement submitted by a correctional officer who had witnessed the alleged infraction. Appellant was sentenced to thirty days in punitive segregation.[1] The board recommended that he lose any good time credits for which he was eligible during that period [2] and that he be considered for possible downgrading in classification at the expiration of the thirty days.[3]

[1] Punitive segregation normally requires that the prisoner be locked in his cell full time. He takes his meals in his cell, is deprived of recreation and exercise, and is not permitted to attend his work assignment. Here, appellant was locked in his cell for twenty-four hours a day during the first five days of punitive segregation, and twenty-three hours each day during the remaining twenty-five days of segregation.

[2] Pursuant to Rhode Island General Laws § 13-2-44, appellant, under sentence to imprisonment for life, was not eligible for good time credit. Were he not sentenced to life, however, he would have been entitled to a recommendation from the Warden that five days be deducted from his prison term for each month he serves on an original sentence of five or more years. Thus, if appellant had been eligible, a loss of thirty days good time would have the effect of extending his term of imprisonment by thirty days.

[3] Pursuant to the Regulations Governing Disciplinary Classification, and Mail Procedures for the Inmates at the Adult Correctional Institutions, State of Rhode Island [hereinafter the *Morris* rules], the disciplinary board may recommend to the classification board that the prisoner's status be changed. Before any downgrading of classification may occur, however, prisoners are entitled to receive (a) timely notice, (b) an opportunity to appear before the board, (c) an opportunity to call and examine witnesses, (d) explanation of the board's rationale in coming to its decision. In addition, (e) decisions of the board must be based upon substantial evidence.

Inmates may be classified into one of four categories, each category carrying with it progressively closer supervision and more restrictions. Category "A" encompasses the general prison population; category "B" entails loss of work eligibility, television, and extended yard privileges, and requires that inmates have all their meals within their cells; category "C" entails all the restrictions of category "B" with the addition that the inmate is placed in a separate living location and deprived of participation in any institutional activities; category "D" entails all the restrictions of category "C" with the additional loss of radio privileges.

After reviewing the record, the district court concluded that appellant had not been denied due process and therefore was not entitled to any of the relief he sought.[4] Although the claim of use immunity arguably did not arise in the original complaint, appellant twice moved for reconsideration of the question of whether he was deprived of his Fifth and Fourteenth Amendment rights against self-incrimination in the prison disciplinary hearing, where he had not been assured that his testimony could not be used to incriminate him in a subsequent criminal prosecution, and had been penalized for his failure to testify in the prison hearing. The district court denied both motions, concluding that the authorities on which appellant relied in support of his motion were distinguishable on their facts from the present case.

[4] The district court concluded that procedural due process was accorded the appellant in the disciplinary proceeding because he was fully advised prior to the hearing of the infraction of the rules, had an opportunity to confer with his counsel with respect thereto, had an opportunity to have a counsel-substitute during the hearing, the charges were read to him at the hearing and he was given the opportunity to explain his actions, he was informed of the evidence against him, and the decision of the disciplinary board was based on facts rationally determined.

This case is one of a lengthening list, raising the questions whether and to what extent due process exists behind prison walls. During the past decade, judicial reluctance to look behind the walls[5] has given way to a special concern that fair and orderly procedures govern there.[6] In the late 1960's federal courts established the general principle that due process follows a prisoner through the prison doors. *Jackson* v. *Bishop*, 404 F.2d 571 (8th Cir. 1969) (Blackmun, Cir. J.); *see also Johnson* v. *Avery*, 393 U.S. 483 (1969). Our own *Nolan* v. *Scafati*, 430 F.2d 548 (1970) held that whenever substantial individual interests of prisoners are at stake, "some assurances of elemental fairness are essential". In the past three years federal courts have been faced with the difficult task of giving specific content to that general principle.[7] Recently the

[5] *See* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963). *See, e.g., Roberts* v. *Pigelow*, 313 F.2d 548, 550 (4th Cir. 1963).

[6] This newly awakened judicial sensitivity is but a part of a growing concern that governmental decisions directly affecting individual interests and causing significant deprivations conform to the rudiments of due process, regardless of whether what is at stake is termed a right, privilege, liberty, or property. *See, e.g., Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearings); *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (due process before parole revocation); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (due process before repossession); *Bell* v. *Burson*, 402 U.S. 535 (1971) (due process before suspension of driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (due process before publicly advertised loss of right to purchase liquor); *Goldberg* v. *Kelly*, 397 U.S. 254 (1969) (due process before termination of welfare payments); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (due process before removal or garnishment of wages).

[7] *See, e.g., McDonnell* v. *Wolff*, No. 72-1331, 1332, 8th Cir. (Aug. 2, 1973); *United States ex rel. Miller* v. *Twomey*, 479 F.2d 701 (7th Cir. 1973); *Sands* v. *Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973); *Rinehart* v. *Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973); *Collins* v. *Hancock*, 354 F. Supp. 1253 (D. N.H. 1973); *Lathrop* v. *Brewer*, 340 F. Supp. 873 (S.D. Iowa 1972); *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Meola* v. *Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971); *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971 appeal docketed; *Morris* v. *Travisono*, 310 F. Supp. 857 (D. R.I. 1970); *Sostre* v. *Rockefeller*, 312 F. Supp. 863 (S.D. N.Y. 1970), *rev'd in part, modified in part, aff'd in part, sub nom. Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971); *cert. denied sub nom., Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

Supreme Court articulated specific requirements for minimum due process applicable to parole revocation proceedings, marking the first time that Court has ventured so directly into the area of due process rights for individuals under custodial authority. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

The task is a delicate one for courts because of the sensitive and precarious nature of correctional institutions. Prison officials, facing complicated and combustible situations each day, must be free to make a wide range of decisions. Much must be left to their good faith discretion. *Sawyer* v. *Sigler*, 445 F.2d 818 (8th Cir. 1971); *Marnin* v. *Pinto*, 463 F.2d 583 (3d Cir. 1972). Time has proved, however, that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.[8]

Control over official discretion within prison walls is vital for other reasons as well. Most decisionmaking of correctional personnel is less visible to the public than is the decisionmaking of other public officials, and therefore less likely to benefit from the inherent constraints of public discussion and scrutiny. Prisoners themselves have no opportunity to participate in a political process which

[8] *See generally*, Fox, *Why Prisoners Riot*. 35 Fed. Prob. 9 (1971).

might otherwise provide some guidance for official discretion.[9] Moreover, because prisoners are under the constant care and supervision of correctional personnel within "total institutions"[10] which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. Finally, it is coming to be realized that almost all of the 1.2 million individuals who are at any one time subject to correctional authority will eventually rejoin the rest of our citizens outside the prison walls; if they are to learn to respect public authority and to participate in the democratic control of that authority as normal citizens, they need to be able to challenge what appear to be arbitrary assertions of power by correctional officials during the course of their confinement.[11]

In determining to what extent due process safeguards are required in prison disciplinary decisions, federal courts have employed two levels of analysis, first examining whether the questioned decision is one which requires due process at all, and then deciding upon the amount of due process which seems necessary under the precise circumstances. The first determination depends upon an assessment of the inmate's stake in the decision, rather than upon a weighing of the inmate's interest against the interests of the state. *See Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972);

[9] *See* Note, *Bargaining in Correctional Institutions: Restructuring the Relations Between the Inmate and Prison Authority*, 81 Yale L. J. 726 (1972); McCleery, *The Governmental Process and Informal Social Control*, in The Prison 149 (D. Cressey, ed., 1961).

[10] E. Goffman, *On the Characteristics of Total Institutions*, in Asylums 49 (1961). *See also* Cloward, *Social Control in the Prison*, in Theoretical Studies in Social Organization of the Prison 20 (Social Science Research Council, ed., 1960).

[11] President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 82 (1967).

Board of Regents v. *Roth*, 408 U.S. 564, 570-71 (1972). The stake will be sufficiently large to necessitate some due process if the consequences of the challenged actions of the state officials are sufficiently serious to amount to a "grievous loss". *See Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Morrissey* v. *Brewer, supra*, 408 U.S. at 481.

In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss. *United States ex rel. Miller* v. *Twomey, supra*, 479 F.2d at 717. This implies that a minimal level of due process must be achieved in reaching any decision concerning a particular inmate which may result in a marked change in the status of the inmate's confinement, with the result that he may be deprived of amenities on which he has come to rely. The stakes are simply too high for the inmate, and the possibility for honest error or irritable misjudgment too great, to allow such decisions to be taken without giving the inmate a chance to be fully informed of the case against him so that he may contest its basis. "In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." *Sostre* v. *McGinnis, supra*, 442 F.2d at 198. This is as true for a decision based on the security requirements of the institution or the rehabilitative interests of the inmate as it is for one based on a disciplinary violation.

Once it has been determined that the inmate's stake in the decision is sufficient to require a minimal level of due process safeguards, the second task facing the court,

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more difficult and more subtle, is to decide how much due process is required beyond this minimal level. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). After the precise interests of the inmate and the state have been identified, the two interests are weighed one against the other. *See Goldberg* v. *Kelly, supra*, 397 U.S. at 261; *Hannah* v. *Larche*, 363 U.S. 520, 442 (1960).

Here, there is no question that some due process was required before appellant could be sentenced to punitive segregation and recommended for a downgraded classification.[12] The real question concerns the extent to which due process was required. Pursuant to the so-called *Morris* rules,[13] appellant was given (a) timely notice of the charge against him, (b) an opportunity to appear at the disciplinary hearing with the assistance of an authorized counsel-substitute, (c) an impartial tribunal, none of whose members reported upon or witnessed the alleged infraction, (d) the right to call witnesses and cross-examine them, (e) the right to a decision based upon "substantial evi-

[12] *See* nn. 1-3.

[13] In *Morris* v. *Travisono*, 310 F. Supp. 857, 859 (D.R.I. 1970), the district court, in a significant and innovative role, oversaw negotiations between prisoners and prison officials and ordered that the results of the negotiations be printed and distributed to prisoners for their final approval. After receiving responses from the inmates to the proposed regulations, the court then implemented the rules by an interim decree, *id.* at 862, but retained jurisdiction to allow for necessary changes and to make sure that the new rules were implemented. The new rules were officially promulgated by the Assistant Director for Correctional Services in February, 1970. *See Regulations Governing Disciplinary Classification, and Mail Procedures for All Inmates at the Adult Correctional Institutions, State of Rhode Island* (1970).

dence", (f) notice of the rationale and consequences of the decision, and (g) the opportunity to appeal the decision to the Warden. Appellant contends that he should have been afforded the additional protections of the right to remain silent in the disciplinary hearing without his silence being used against him, the right to have the correctional officer who reported the infraction and any witnesses on whose testimony the fact-finding is based appear in person before the disciplinary board, and the right to retained counsel at the hearing. In effect, appellant argues that a proper balance of the state's interest in efficient custody against the possibly grievous consequences of prison discipline in this case—including punitive segregation, loss of prison earnings for that period, recommended change in classification, possible effect of the decision upon his chances for parole,[14] and possible use of the hearing record in a subsequent criminal prosecution—warranted greater due process safeguards than those offered by the *Morris* rules.

The task of striking a proper balance between appellant's interest in due process safeguards and the state's interest in efficient custody is at best an awkward and difficult one. No well defined standards have been developed for taking such measurements,[15] and a utilitarian calculus

[14] The findings of the disciplinary board may be taken into consideration at parole board hearings, as well as at classification board hearings. According to the *Morris* rules, *supra*, n. 13, the central file of each inmate committed to the A.C.I. for more than one year must include (a) regular case summaries; (b) probation officer's report and other diagnostic summaries from other agencies; (c) up-to-date progress reports in the areas of work assignments, vocational training, education, psychiatry, and medical treatment; (d) records of disciplinary board determinations; (e) any correspondence relating to the inmate; (f) identification material; (g) a record of all classification transactions.

[15] While some standards are emerging as to how much due process is due in the maintenance of prison discipline, *see Miller* v. *Twomey, supra; McDonnell* v. *Wolff, supra; Sands* v. *Wainwright, supra;*

of the benefits of possessing certain rights against the costs of supplying them seems a harsh and futile exercise in legal fiction. Moreover, it is an exercise that is bound to create uncertainty and litigation, given the extraordinary and expanding range of correctional decisions that may result in a variety of deprivations, and the ever broadening catalogue of procedural rights which might be relevant to the prison setting.[16] Yet certainty and consistency are no

Rinehart v. *Brewer*, *supra*; *Collins* v. *Hancock*, *supra*, the courts have not as yet articulated the methodology they employ in arriving at the appropriate balance between due process and the interests of the state in efficient custody. While there seems to be some general agreement that the extent of due process required by *Goldberg* v. *Kelly*, *supra* and *Morrissey* v. *Brewer*, *supra*, frames the outer limit of due process required within prison walls, federal courts have failed to come up with any useful measuring rod for determining the extent of due process within this outer limit. *See* Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. Rev. 309 (1973).

[16] As the correctional facility adds new rehabilitative programs and activities, administrative discretion becomes broader. The correctional officer or administrator can, in some cases, decide upon various degrees of custody within the same category of classification; he can offer schooling, jobs, and training programs (or decide not to offer them); he can grant furloughs, work-release, school release, weekend release (or stop granting them); he can provide the inmate with an interesting and relatively lucrative job assignment, or a poor one. *See* Rubow and Elias, *Organizational Boundaries, Inmate Roles, and Rehabilitation*, 6 Crime and Delinquency 8 (1969); *see generally*, Sykes, *The Corruption of Authority and Rehabilitation*, 34 Soc. Forces, 257 (1956).

At the same time, the possible catalogue of procedural rights which might be applicable inside the prisons grows longer. The possible catalogue of rights might include, beyond what is already provided in the *Morris* rules, a right to the promulgation of written regulations which are reasonably specific, the suppression of any evidence which was wrongly discovered, the power to subpoena witnesses, and the power of discovery, a transcript of the disciplinary proceedings, formal rules of evidence during the hearing, a jury of peers, conviction only upon the overcoming of a high presumption of innocence, and direct appeal. We hasten to add that this catloguing is not an invitation to inmates to further litigation but, rather is merely intended to illustrate the wide variety of safeguards encompassed within the concept of procedural due process.

less desirable in the law relating to life in prison than they are in life beyond the walls.

The primary responsibility for articulating standards of due process lies with those who have the most intimate knowledge of both the interests of prisoners and the administrative burdens entailed with providing due process within prison. To the extent that legislators, prison officials, and prisoners themselves have spoken on the subject, they provide an essential source of guidance. We are fortunate in this case to have a set of rules for due process within prison that was carefully shaped by prisoners and correctional administrators working together under the aegis of the district court. The *Morris* rules have provided a workable and useful standard for measuring the extent to which due process safeguards are required in correctional decisions which may result in punitive segregation, loss of good time, and changes in classification. Moreover, the standard is substantially the same as that employed elsewhere within this circuit, *see Collins* v. *Hancock*, *supra*; *Meola* v. *Fitzpatrick*, *supra*, and conforms in large part to the standard set out in model legislation.[17]

The *Morris* rules, however, do not necessarily exhaust the constitutional imperative of the due process clause, or fill all the fissures. No questions are more elusive for courts than these: when does a *constitutional* interstice exist? By what reasoned process, consistent with constitutional precedents, changing perspectives of foreseeability

[17] *See*, *e.g.*, Boston University's Center for Criminal Justice, *Model Rules and Regulations on Prisoner's Rights and Responsibilities* (1973); National Council on Crime and Delinquency, *Model Act to Provide for Minimum Standards for the Protection of the Rights of Prisoners* § 4, 18 Crime and Delinquency 12 (1972); President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: Corrections* 86 (1967); *see also* legislation introduced in Congress which was designed to provide minimal procedural safeguards for prisoners in the maintenance of prison discipline, H.R. 12757, 92nd Cong., 2d Session (1972).

and expectation and realistic restraints of practicability, can courts attempt to fill such a gap? While constitutional analysis on a macroscopic scale, dealing with the liberties specifically enshrined in the Bill of Rights, is rich with precedent, its application to the smaller liberties and their deprivations is still a new venture. *But see* n. 6. And the standards for measuring and balancing the interests of the individual and of society, except where one side or the other has the most compelling appeal, are as yet unarticulated. But unless a court were to accept the concept that the Constitution is limited to preventing only the grossest of governmental encroachments on personal freedoms, it must try to deal rationally with the emerging problems. While not usurping the legislative or executive roles, it must articulate a constitutional framework specific enough to guide government in government's own continuing pursuit of constitutional norms.

We are fully sensitive to the fact that public administrators may view court decisions affecting "lesser" rights as intrusions into their own realm, and as setting the outer limits of constitutional accommodation. Two observations can help place this area of adjudication in perspective. The first is that the "realm" is that of the Constitution, and that the Constitution is, in the first instance, addressed to government and its officials; this is the premise, not the consequence, of judicial review. The second is that a court decision can most constructively be taken as not only prescribing, as a minimum, a specific rule arising out of a particular case, but as a helpful guide in suggesting the direction in which administrators may soundly proceed with their more detailed implementation.

The government would have us merely examine whether or not the current limitations upon due process are rationally related to the legitimate state goal of efficient custody; if such a rational relationship were found to exist, then

the procedural safeguard would be unwarranted.[18] We cannot accept, even by implication, this formulation of the rule in the type of situation presented by this case. While due process safeguards have not as yet been elevated to the status of fundamental rights, such as freedom of speech, in relation to which the state's interests in administrative efficiency must take second place, they are not to be abridged unnecessarily. That is, we think that if the state can accomplish its purpose just as well by observing some measure of due process as by not observing it, it should tread the former path. Where a due process safeguard entails little or no administrative burden, it should be employed whenever due process is merited. If the burden on the state is minimal, there seems to be no reason why the decision should not be made with the greatest possible care.

Perhaps because there may be few situations where it can be said that little or no administrative burden attends the provision of some due process safeguards, courts have not had occasion to speak in these precise terms. But we think this threshold test, limited though it may be in application, is but an extrapolation of the Court's pronouncements in larger matters. The government's obligation here is fundamentally the same as that underlying its obligation to use "less drastic means" when infringing upon First Amendment rights, *see United States* v. *Robel*, 389 U.S. 258, 267 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960),[19] or its obligation to use the "least restrictive alternative" when impinging up travel, free flow of commerce, or property rights, *see Aptheker* v. *Secretary of State*, 378 U.S. 500, 507 (1964); *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U.S. 361, 375 n. 9 (1964);

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[18] *See, e.g.*, the rational relation upheld in *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

[19] *See* Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969); *see generally*, Wormuth and Merkin, *The Doctrine of the Reasonable Alternative*, 9 Utah L. Rev. 254, 267 (1964).

Dean Milk Co. v. *City of Madison*, 340 U.S. 349, 354 (1951);[20] *see also Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965). When the government has "reasonable and adequate alternatives available" to a given end, it must choose the measure which least interferes with individual liberties. *Dean Milk Co.* v. *City of Madison*, *supra*, 340 U.S. at 354. In the present case, if the government can achieve its goal of efficient custody equally well under an alternative scheme which provides greater due process safeguards, it is obligated to follow that alternative.

With this principle in mind, we turn to an examination of each of the due process claims of the appellant.

Appellant's contention that he should have been afforded the additional protection, beyond the *Morris* rules, of the right to remain silent without his silence being used against him in the disciplinary hearing is based upon an understandable fear that any statements made at the hearing might have been used against him at a later criminal trial concerning the same offense. Without a right to remain silent in the disciplinary hearing, he faced the constitutionally obnoxious dilemma of either remaining silent and risking greater punishment from the disciplinary board or speaking out in his own defense and risking self-incrimination in a subsequent criminal prosecution. *See Garrity* v. *New Jersey*, 385 U.S. 493, 496 (1967). Thus, to penalize silence in the disciplinary hearing is, in effect, to penalize the Fifth Amendment privilege against self-incrimination. *See Spivack* v. *Klein*, 385 U.S. 511 (1967); *United States* v. *Jackson*, 390 U.S. 570, 581-82 (1968); *Simmons* v. *United States*, 290 U.S. 377 (1968); *Melson* v. *Sard*, 402 F.2d 653 (1968); *Carter* v. *McGinnis*, 351 F. Supp. 787 (W.D. N.Y. 1972).[21] Although under *Miranda* v. *Arizona*, 384 U.S. 436

[20] *See* Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967).

[21] The government's reliance upon *McGautha* v. *California*, 402 U.S. 183 (1971) in this regard is misplaced. While *McGautha* holds that a defendant faced with the difficult conundrum in a unitary trial of speaking out for a lenient sentence and risking self-incrimination on the issue of guilt is not denied the protection of the Fifth Amendment, the choice facing prisoners within a prison disciplinary hearing is far different. A criminal defendant faces many difficult choices during the course of his trial: whenever he exercises his right to remain silent, he quite naturally sacrifices one means of defense; on the other hand, if he speaks out, he may open himself to otherwise inadmissible matters which may be brought out on cross-examination and also to impeachment by proof of prior convictions. *See Spencer* v. *Texas*, 385 U.S. 554, 561 (1967). The dilemma faced in *McGautha* is but one variant on these traditional, strategic considerations that run through criminal trials. It should be kept in mind, however, that a defendant in a criminal trial may remain silent and yet still have the opportunity to mount a strong defense by calling and cross-examining witnesses. He is also protected by the high burden of proof which the government must sustain before he can be found guilty. Under these circumstances, silence is not a fundamental sacrifice. It is often a wise strategy.

The accused prisoner, however, has no such procedural safeguards within the prison hearings. His opportunity to call witnesses and cross-examine them is necessarily limited by the possibility that the disciplinary board may rely upon informants. The burden of proof which must be sustained against him is far lower than in a criminal trial, merely calling for "substantial evidence". If he keeps silent, his silence is almost bound to seriously cripple his defense within the disciplinary hearing. Silence is not a strategic alternative for him.

(1966) and *Mathis* v. *United States*, 391 U.S. 1, 4-5 (1968), any incriminating statements made within a custodial interrogation would presumably be suppressed at a subsequent criminal trial, the exclusionary rule provides scant protection where, as here, a defendant can never by wholly certain that his statements will be suppressed later on, especially since his actions may be interpreted as a voluntary waiver of such rights. Moreover, even if suppressed, defendants' statements within the disciplinary hearing may be useful to state prosecutors in planning and developing their prosecution. Evidence derived from such testimony may be seriously damaging to the defendant; the mere prospect of its use is likely to seriously inhibit the defendant from making any statements whatsoever. And because state prosecutors are apt to be interested in

gathering evidence concerning a wide range of offenses occurring both inside and outside the prison walls, and implicating many prisoners, defendants within a prison disciplinary hearing may have an understandble fear of "fishing expeditions" designed to gather information. *See Sands* v. *Wainwright, supra; Carter* v. *McGinnis, supra; Clutchette* v. *Procunier, supra,* 328 F. Supp. at 778-79.

The right to remain silent in the disciplinary hearing without his silence being used against the inmate would, however, impose a significant burden upon the processes of fact finding within the disciplinary hearing. The hearings are designed to enable inmates to challenge and dispute allegations about their behavior, and to explain "their side of the story".[22] The practical effect of a right to remain silent would be to eliminate such an opportunity, and force the inmate and the disciplinary board to rely exclusively upon the statements of witnesses. Not only would such reliance be time consuming, but it might also prompt inmates "to pit their own resources against correctional staff in ways that challenge institutional solidarity and encourage confrontations in other areas".[23] Moreover, an exercise of the right to remain silent does not impose a significant burden upon the defendant in a normal criminal trial, because of such procedural safeguards as a strong presumption of innocence, a high burden of proof which the prosecution must overcome, and the full right to call witnesses and cross-examine adverse witnesses. Such safeguards, however, do not exist within the prison disciplinary hearing; if they did, the administrative burdens thereby entailed would be significant. Thus, an inmate's silence is likely to work against him in the disciplinary hearing,

[22] *See* Lovell and Nelson, *Correctional Management and the Changing Goals of Correction*, in Problems in Criminal Justice Administration 82 (M. Cohn, ed., 1969).

[23] Note, *Bargaining in Correctional Institutions*, *supra*, at 733.

because in maintaining his silence he sacrifices his most important defense.

We need not enter into a balancing equation concerning the right to remain silent, however, because another route is open which would protect the inmate from self-incrimination in a subsequent criminal prosecution, while imposing no burden upon the prison disciplinary hearing. Where the possibility exists of the inmate being penalized for the same criminal conduct in a disciplinary hearing and a criminal trial, he should be entitled to "use" immunity for statements he might make within the prison disciplinary hearing. *See Sands* v. *Wainwright, supra,* 357 F. Supp. at 1093; *Carter* v. *McGinnis, supra,* 351 F. Supp. at 793; *cf. Melson* v. *Sard,* 402 F.2d 653, 655 (D.C. Cir. 1968); *Kastigar* v. *United States,* 406 U.S. 441 (1972). The provision of use immunity reflects a rational accommodation between the imperatives of the privilege against self-incrimination and the legitimate requirements of prison disciplinary procedures. In order for this immunity to be helpful to the inmate, however, it would be necessary that he be informed of its existence and its consequences at the prison disciplinary hearing.

Appellant's second contention is that the disciplinary board should have required adverse witnesses to appear in person before it, rather than rely solely upon the written reports of prison personnel. Although the *Morris* rules specifically provide an accused inmate with "the right to call a reasonable number of witnesses, both adverse and favorable, and examine said witnesses",[24] appellant did not exercise his right to confront and cross-examine the complaining officer who witnessed the alleged infraction. Appellant claims, instead, that the burden of summoning adverse witnesses should be upon the disciplinary board, rather than upon the accused inmate. If the board declines

[24] *Morris* rules, Disciplinary Procedures § III,C,4.

to take the initiative and chooses to rely exclusively upon written reports, appellant argues that the board would thereby lack sufficient evidence to convict.

We disagree. We can envisage situations in which the board might justifiably conclude that written reports were sufficiently clear and complete so that further incriminating evidence was unnecessary. So long as the accused inmate might bolster his defense by having the opportunity to call adverse witnesses and cross-examine them, no purpose would be served by creating a per se rule that the board itself must rely only upon witnesses who appear before it. We would caution, however, that in instances where the identity of an adverse witness is withheld from an accused inmate, out of a legitimate fear that otherwise the witness would be subject to retributive violence,[25] the board has a strong obligation to summon the adverse witness before it, in camera, and probe the credibility of the witness. *See Birzon* v. *King*, 469 F.2d 1241 (2d Cir. 1972).

Appellant's final contention is that due process requires that he be allowed to retain legal counsel within the disciplinary hearing. The *Morris* rules provide for the assistance of a classification counselor or other individual specifically approved by the prison administration if the accused inmate requests help in the presentation of his case before the board.[26] Here, the appellant was offered the assistance of a counsel-substitute during the hearing, and was permitted to consult with his retained legal counsel immediately before the hearing, but his retained counsel was barred from the hearing.

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[25] *Id.* at § III,C,3.

[26] *Id.* § III,C,5. We necessarily assume that counsel-substitute, reasonably experienced in the procedures to be employed in prison disciplinary hearings, will explain questions put to the accused, occasionally help the accused make himself understood, and advise the accused on how to proceed with his questioning of the complaining officer or witnesses to the infraction.

Appellant relies upon *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), in which the Supreme Court indicated that, under some circumstances, counsel might be required within probation revocation hearings. We think, however, that appellant's reliance is misplaced. In *Gagnon*, the Court did no more than leave the decision whether to supply counsel up to the discretion of the state, saying that "the participation of counsel will probably be both undesirable and constitutionally unnecessary" in most cases, and that the state should consider, among other things, the complexity of the evidence and "whether the probationer appears to be capable of speaking effectively for himself." *Gagnon* v. *Scarpelli, supra*, 411 U.S. at 790. Here, there is no claim that the complexity of the evidence or special difficulties of communicating to the disciplinary board made counsel imperative.

While we are well aware that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel", *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932), we do not feel that prison disciplinary hearings necessarily require professionally trained counsel. The requirement of professionally trained counsel in all cases could amount to a significant expense for the government, both in supplying counsel for the accused and, because the hearing is likely to become more adversarial as a result, in prolonging the proceeding and making it necessary for the state to be represented by its own attorney. The state is not now represented by a prosecutor within the hearings, nor are formal rules of evidence in force to the extent that a defendant's procedural rights may be lost if not timely raised. Nor is there a jury for whom a defendant's presentation must be made understandable. *See Gagnon* v. *Scarpelli, supra*, 411 U.S. at 789. Moreover, the evidence as to whether the inmate has violated a prison regulation is likely to be

simpler, more precise and more readily at hand than in most criminal trials, *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir. 1971). While the requirement of legal counsel might be more compelling where the accused, faced with a possible criminal prosecution in the future, had to walk a tightrope between defending himself now and incriminating himself later on, the provision of use immunity eliminates this potentially complicated endeavor. We have no reason to believe that counsel-substitute, of the sort provided for in the *Morris* rules, will not normally provide adequate assistance to an accused inmate within the disciplinary hearing.

Appellant emphasizes that any mistakes of fact which may have slipped through the hearing are likely to find their way to the State Parole Board when appellant is eligible for parole, and that the presence of counsel at the hearing would have prevented this. Several courts have recognized the damaging nature of a mistake of fact in an inmate's prison record which may follow him through the prison system, unfairly punishing him anew each time his record is used against him. *Burgett* v. *Texas*, 389 U.S. 109, 115 (1967); *McDonald* v. *Wolf*, No. 72-1331, 8th Cir. (Aug. 2, 1973); *Hudson* v. *Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970). But we think that a counsel-substitute can be sufficiently effective within most hearing to protect against any serious mistakes of fact on which the disciplinary board might base its findings. Moreover, because a variety of reports and unsupported allegations of fact by correctional personnel may find their way, at various times, into the inmate's prison record, a far better way of protecting the inmate from such mistakes would be to let him review and challenge his record whenever correctional decisions are based, wholly or in part, upon the prison record.

While we therefore conclude that there is, under normal circumstances, no duty upon the state to furnish counsel

in prison disciplinary hearings, we are also of the opinion that an inmate should be permitted to bring retained counsel with him into the disciplinary hearing.[27] We adhere to the approach of the Supreme Court in *Goldberg* v. *Kelly*, *supra* 397 U.S. at 270, 271 (1969) in saying that the right to retained counsel is constitutionally required where grievous loss is threatened and the presence of retained counsel will not unduly prolong or otherwise encumber the hearing.[28] While authority is scarce in this

[27] In light of our principle of extending procedural due process where there is little or no administrative burden, we assume that counsel's role would be limited to consultation with the accused, observation of the proceedings, and occasionally speaking on behalf of the accused. Under our approach, it is likely that a larger role than this would begin to create an unwarranted administrative burden. Thus, counsel would not participate in cross-examination, for that might understandably prompt the prison officials to obtain legal counsel to represent the prosecution's side of the adversarial process.

[28] Whatever the constitutional distinction between the right to retained counsel as opposed to appointed counsel, it is clear that the former is historically broader in scope than the latter. *See* Davis, *Administrative Law Treatise*, § 8.10 (1958). Contrary to the suggestion of our dissenting brother, we do not here purport to exercise any supervisory power.

We acknowledge that to permit retained counsel while not requiring appointed counsel might deny those who could not afford their own retained counsel the equal protection of the laws, a circumstance found by two circuits to arise in parole revocation proceedings, *Earnest* v. *Willingham*, 406 F.2d 681, 684 (10th Cir. 1969), and probation revocation proceedings, *Wainwright* v. *Cottle*, 13 Cr. L. 2176 (5th Cir. 1973), *vacated and remanded*, 42 U.S.L.W. 3218 (Oct. 16, 1973).

We do not, however, deal with that issue at this time. The prison administrative hearing, even when resulting in segregation or loss of good time, may require less of an adversarial proceeding and necessitate fewer due process safeguards than a hearing which could result in the revocation of the liberty entailed in parole or probation. Consequently, the possibility of a denial of equal protection for inmates too poor to afford retained counsel may be reduced in the prison context. Moreover, both *Earnest* and *Wainwright* were decided before *Gagnon's* ad hoc rule for deciding when counsel is to be required in revocation proceedings. Apparently the Supreme Court felt that *Gagnon's* rationale was sufficiently relevant to vacate *Wainwright* and remand it for further consideration in light of *Gagnon*.

developing area of law, the few courts which have faced this particular issue have permitted retained counsel, *see Landman* v. *Brewer, supra,* 333 F. Supp. at 654; *Sands* v. *Wainwright, supra,* 357 F. Supp. at 1089.

Retained counsel might benefit the accused in several ways. Counsel could speak on behalf of the accused at the hearing, particularly in those cases where the accused inmate was inarticulate or had difficulty understanding the questions put to him. In addition, counsel's presence at the disciplinary hearing and later recollection of what occurred therein might help assure that the immunity accorded the inmate is not violated in subsequent proceedings. The occasional presence of counsel might also have the helpful cautionary effect of assuring that all necessary due process safeguards were provided for within the hearing.

The presence of retained counsel at the disciplinary hearing could also benefit the correctional administration of the prison. Counsel might provide correctional administrators with useful guidance in novel situations where no procedural rules had as yet been developed. And because the precise rudiments of prison disciplinary hearings exist in a developing area of the law where no firm guidelines exist, trained legal counsel may be of important assistance in reaching accommodations between inmates and administrators which would avoid the necessity of continued litigation.

Finally, since inmates are currently permitted to consult with their retained counsel at the A.C.I. outside the disciplinary hearing, we can see no rational purpose served by not allowing them access to their counsel within the hearing. On the contrary, intermittent consultations with retained counsel outside the hearing room while the hearing is in progress would seem to result in unnecessary prolongation of the proceedings. Moreover, the government has

offered no reason why retained counsel should not be permitted within the disciplinary hearings.

We therefore conclude that appellant was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing. Since, however, this solution is novel, the appellee cannot in fairness be subjected to a sanction which would ordinarily accompany the violation of preexisting law, *Jones* v. *Rundle,* 358 FS 939 (June 12, 1973); *cf. Great Northern Railway Co.* v. *Sunburst Oil and Refining Co.,* 287 U.S. 358 (1932). It follows that appellant's claim for money damages must be denied. However, appellant's in-prison record will be expunged of all findings and decisions pertaining to the alleged infraction and the disciplinary board hearing. We will apply this rule in the future only to those cases where a disciplinary hearing occurs subsequent to the date of this opinion.

The judgment is reversed.

KILKENNY, *Circuit Judge,* (dissenting).

I respectfully dissent. In my opinion, the prison officials were under no constitutional, or other, duty to inform the appellant of the existence and possible benefits of the doctrine of "use immunity" in connection with statements that he might make in the prison disciplinary hearing. Indeed, if such a duty existed, appellant is in no position to assert it. He had the advice of retained counsel, who, we must assume, was familiar with the doctrine and, evidently, in weighing the consequences decided not to suggest its use.

Moreover, I am acquainted with no legal doctrine which

would require the presence of appellant's counsel at the time of the hearing. If, as in *United States* v. *Ash*, 413 U.S. —— (June 21, 1973), a defendant charged with the crime of bank robbery is not entitled to the presence of counsel during a pre-indictment display of photographs arranged for the specific purpose of identification, I fail to understand how we, in this type of hearing in the exercise of alleged supervisory powers, can direct states to permit the presence of retained counsel. For that matter, I am unable to discover a legal principle which would require the presence of retained counsel at a hearing, and then deny to a prisoner the presence of court appointed counsel at the same type of hearing. If fundamental fairness requires the presence of counsel at one, it necessarily requires such presence at the other.

Inasmuch as I believe that the so-called Morris Rules adequately protect a prisoner's limited fundamental rights, and that appellant's other claims do not present issues of constitutional dimensions, I would affirm.

UNITED STATES SUPREME COURT

July 8, 1974

[reported 418 U.S. 908 (1974)]

No. 73-1247. BAXTER ET AL *v.* PALMIGIANO. C.A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wolff* v. *McDonnell*, *ante*, p. 539. Reported below: 487 F.2d 1280.

NOTE: The Opinion of the United States Court of Appeals for the First Circuit, filed December 20, 1974, is reproduced in Appendix A to the Petition for Writ of Certiorari filed in this case on March 19, 1975.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
INTER-OFFICE MEMO

Date: March 14, 1975

To: Joel Landry, Assistant Legal Counsel
Adult Correctional Institutions
Dept.: Corrections
From: Roger M. Donnelly, Hearing Officer
Adult Correctional Institutions
Dept.: Corrections
Subject: *Backlog of Disciplinary Reports*

Sir,

As of this date, total regular bookings number 130. Total bookings requiring attorneys present is 50. The grand total is 180. On the regular bookings, we can average 8 cases a day. On required attorney bookings, we can average 5 per day. At this projection, on a 4½ day work week we are 24 days behind from the infraction to hearing. This projection is correct if we are able to get the attorneys at the hearing on appointment dates and times. If, we are able to get all officer witnesses to be present during hearings without delays due to the shortage of personnel, days off, etc., if the board has a place to meet, and if there is a member of custody able to sit on the board in the mornings at Maximum Security. It has been my experience over the past seven (7) months to only have ideal conditions on approximately 25% of all cases heard. To date, I have come across three (3) inmates who have refused a legal assistance attorney provided by the state. These inmates requested their own attorneys. At this point, the hearing had to be continued. But, it seems that their own attorneys are hard to reach, too busy, etc. and without being able to give notice for forthcoming hearings to these attorneys, I find it impossible to schedule. Once word gets out to the inmates that by requesting their own attorneys

to be present, this will become very fashionable to do with inmates wishing to prolong the hearing dates, thus giving the board yet another obstacle.

Respectfully submitted,

(s) Roger M. Donnelly, Hearing Officer

RMD/gl

cc: James W. Mullen, Warden
Robert E. Houle, Assistant Warden
File (1)

DISCIPLINARY REPORT LOG – DECEMBER, 1974 THROUGH NOVEMBER, 1975

MONTH	NUMBER OF HEARINGS	NUMBER OF INMATES	TOTAL = OF INMATES	GUILTY	NOT GUILTY	DISMISSED	POSTPONED
DECEMBER	100	66	63	83	4	13	
JANUARY	69	57	55	58	7	4	
FEBRUARY	101	54	48	76	5	20	
MARCH	118	64	57	102	4	12	
APRIL	140	82	76	92	5	43	
MAY	175	79	78	137	10	28	
SUBTOTAL	703	402	377	548	35	120	
JUNE	123	84	80	93	7	23	
JULY							
AUGUST							
SEPTEMBER							
OCTOBER .							
NOVEMBER							
TOTAL							

MONTH	NO. OF HEARINGS	INMATES Total	Actual =	GUILTY	NOT GUILTY	DISMISSED	POSTPONED
Dec. 1973	47	39	36 [1]	39	3	3	2
Jan. 1974	67	56	47 [3]	54	5	7	1
February	51	44	33 [2]	42	7	2	0
March	97	90	72 [2]	74	14	9	0
April	61	58	44 [3]	48	5	8	0
May	67	59	39 [5]	45	15	7	0
SUBTOTAL	390	346	271 [16]	302	49	36	3
June	69	57	49 [1]	55	5	9	0
July	76	49	38 [4]	59	7	9	1
August	70	57	47 [1]	54	10	6	0
Sept.	76	60	52	61	11	4	0
October	108	93	74	88	9	11	0
November	90	69	66	69	7	14	0
TOTAL	879	731	597	688	98	89	4